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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1322

MAX LEVINSON, PETITIONER,

vs.

SPECTOR MOTOR SERVICE, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED JUNE 19, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 139

MAX LEVINSON, PETITIONER,

vs.

SPECTOR MOTOR SERVICE, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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[fol. 1] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 8th day of May in the year of our Lord, one thousand nine hundred and forty-four, within and for the State of Illinois.

Present: Clyde E. Stone, Chief Justice, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice William J. Fulton, Justice Walter T. Gunn, Justice June C. Smith, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit, on the 2nd day of September, 1944, the same being in vacation after the term of Court aforesaid there was filed herein the Record of the Municipal Court of Chicago in a certain cause entitled:

No. 28309

MAX LEVINSON, Employee, Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corporation, Appellee

4161115 42651

Appeal from Appellate Court, First District

[fol. 2] And Afterwards, on the same date, to-wit, September 2, 1944, there was filed by Appellant herein, an Abstract of Record, which is in the words and figures following, to-wit:

[fols. 3-7] In the Supreme Court of Illinois, September Term, A. D. 1944

Max Levinson, Employee, Plaintiff-Appellant,

vs.

Spector Motor Service, a Corporation, Defendant-Appellee

Appeal from the Appellate Court of Illinois, First District, on Certificate of Importance

There Heard on Appeal from Municipal Court of Chicago

Honorable Wendell E. Green, Judge Presiding

Abstract of Record—Filed September 2, 1944

Placita.

Plaintiff's Statement of Claim

Praecipe and Statement of Claim, amount claimed, $500.00, filed April 16, 1942, as follows:

"Plaintiff brings this action to recover from defendant unpaid overtime compensation in the amount of $487.44, and an additional equal amount of liquidated damages, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act, and particularly Section 7 of said Act, which reads in part as follows:

'Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is [fol. 8] engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than

one and one-half times the regular rate at which he is employed.'

Jurisdiction is conferred on the court by Section 16(b) of the Act.

The aforesaid Act became effective October 24, 1938. Defendant employed plaintiff from October 1, 1939 to September 30, 1940 as a laborer on the basis of clock time, for which period no claim is made.

Defendants employed plaintiff from October 1, 1940 and continuously thereafter up to and including October 6, 1941 (except one week vacation during July, 1941), for which claim is made; that his work consisted of moving freight to trucks where it was to be loaded and unloaded; he received freight which was to be unloaded from private customers' trucks, placing same on two-wheel trucks; he stamped bill of lading from various states named thereon and turned same over to the office; he received incoming freight from various states and cities which was shipped to said terminal; he checked shipment bills from various states named thereon against shipment freight loads to see that they corresponded and tallied correctly; he checked payrolls of dock hands, all of which constituted the performance of duties in interstate commerce within the meaning of the aforesaid Act.

During the aforesaid period of October 1, 1940 to October 6, 1941, defendant employed plaintiff in the performance of duties in interstate commerce as aforesaid for workweeks longer than the applicable maximum number of [fol. 9] hours under Section 7 of the aforesaid Act and failed and refused to compensate him for such employment in excess of such applicable maximum in such workweeks at the rates of not less than one and one-half times the regular rates at which he was employed.

During the aforesaid period from October 1, 1940 to October 24, 1940, inclusive, defendant employed plaintiff in its said terminal as aforesaid for 87 hours during each week and paid wages to plaintiff at the rate of $150.00 per month, or 40¢ per hour. Under the provisions of Section 7 of said Act, plaintiff should have received 40¢ per hour for the first 42 hours in each such workweek and under the provisions of Section 7 of said Act, overtime compensation at a rate of not less than 20¢ per hour for each hour in excess of 42 in such workweek. Plaintiff was accordingly

underpaid the sum of $9.00 during each such workweek, or $30.87 for the said period.

That from October 25, 1940 up to and including said date of October 6, 1941 (excepting said one week vacation duly July, 1941) defendant employed plaintiff in its said terminal as aforesaid for 87 hours during each week and paid wages to plaintiff at the rate of $150.00 per month, or 40¢ per hour. Under the provisions of Section 7 of said Act, plaintiff should have received 40¢ per hour for the first 40 hours in each such workweek and under the provisions of Section 7 of the Act, overtime compensation at a rate of not less than 20¢ per hour for each hour in excess of 40 in such workweek. Plaintiff was accordingly underpaid the sum of $9.40 during each workweek, or $456.57 for the said period.

Plaintiff prays judgment for $487.44 and for an additional equal amount as liquidated damages, together with costs and a reasonable attorney's fee."

Summons issued April 16, 1942.

Appearance of defendant, Spector Motor Service, Inc., filed April 18, 1942.

Original affidavit of merits, filed July 21, 1942.

[fol. 10] Order entered December 15, 1942, granting leave to defendant to file amended affidavit of defense instanter.

Amended Affidavit of Defense

Defendant's amended affidavit of defense, filed December 15, 1942, as follows:

"Plaintiff has no right to bring any action under the Fair Labor Standards Act because of nature of the plaintiff's employment and he is specifically exempted from the aforesaid Act.

That this defendant is engaged in the business of an interstate freight by motor vehicle; that the activities of this defendant, and its employees are under the specific jurisdiction of the Interstate Commerce Commission by virtue of the U. S. Motor Carrier Act of 1935; that plaintiff performed, pursuant to his said employment, the duties of and actually worked as a Dockman, Loader and Dock Foreman, and during all of said time he performed no duties other than those inherent to, directly connected with and incidental to the duties of a Dockman, Loader and Dock Foreman, and as such was directly connected with and his

work was responsible for and incidental to the safety of the vehicles and the cargo carried thereby, and the persons connected therewith or who may come in contact with said cargo, vehicles or either or both of them, and does not come under the provisions of the said Labor Act in that employees of said category are specifically exempted thereby.

That defendant denies that it employed the plaintiff for the number of hours set forth by him.

DEFENDANT'S MOTIONS FOR JUDGMENT

Defendant's written Motion at close of all the evidence, to enter judgment for the defendant and against the plaintiff.

Order overruling defendant's Motion at close of plaintiff's case, for a finding against the plaintiff.

Order overruling defendant's Motion at the close of all the evidence, for a finding in favor of the defendant.

[fol. 11] Defendant's written motion at the close of plaintiff's evidence, for judgment in favor of the defendant and against the plaintiff.

Draft order entered by court December 28, 1942, as follows:

FINDINGS AND JUDGMENT

"This action is predicated on the Fair Labor Standards Act of 1938.

It is alleged by plaintiff that defendant is engaged in interstate commerce; that plaintiff was employed by defendant from October 1, 1939 to September 30, 1940 as a laborer on the basis of clock time, for which no claim is made; that from October 1, 1940 up to and including October 6, 1941, plaintiff was employed by defendant as a terminal foreman and on a different basis than theretofore, at the rate of $150.00 per month payable bi-monthly; that he then acted as terminal foreman and performed incidental duties, none of which were connected with safety of operation and involved wide fluctuations in the time required to complete his duties;

That under Section 7 (a) (2), which was operative from October 25, 1939 to October 24, 1940, the work week was forty-two (42) hours, whereas plaintiff worked eighty-seven (87) hours; that under Section 7 (a) (3), which became operative October 25, 1940 up to the present, provided for a work wek not longer than forty (40) hours, whereas plaintiff

worked eighty-seven (87) hours per week; for all of which he is entitled to time and one-half, together with a sum equal for liquidated damages and attorney's fees.

To this claim defendant filed an affidavit of merits generally denying there is due plaintiff any moneys or that plaintiff worked the alleged number of hours and asserted that plaintiff is exempt from Fair Labor Standards Act of 1938 but comes within Section 13 (b) (1) of the same Act. Specifically, this defendant admits all the duties alleged [fol. 12] to have been performed by the plaintiff except that of checking payrolls and that plaintiff was employed as a dock hand and did the usual work of a dock hand.

Defendant subsequently filed an amended affidavit of merits with the same general allegations but in the main alleging that plaintiff worked as a dockman, loader and dock foreman and performed no other duties than those inherent to, directly connected with and incidental to the duties of a dockman, loader and dock foreman.

During the trial of this cause plaintiff testified in support of his allegations as to his duties performed from October 1, 1940 to October 6, 1941, some of which were connected at most with the stacking of outbound freight in a proper and safe manner. However, the duties which he performed other than that were numerous and involved wide fluctuations and the time that consumed was by far greater than his supervisory acts with reference to stacking outbound freight. He also testified in support of his allegations as to the number of hours worked.

Defendant introduced testimony to support its contention.

The Court FINDS as a matter of fact that the testimony in this case supported plaintiff's claim that he worked eighty-seven (87) hours per week from October 1, 1940 to October 6, 1941.

The Court FINDS as a matter of law that plaintiff received One Hundred Fifty Dollars ($150.00) per month, and was not paid for the overtime which he worked in violation of Section 7 (a) (2 and 3).

The Court further FINDS that plaintiff's work to be performed, or the major portion thereof, for the period herein sued did not affect the safety of defendant's operations within the meaning of Section 16 (b) of the Fair Labor Standards Act and is not exempt under and by virtue of the provisions of said Section 16 (b) of the Fair Labor Standards Act of 1938.

That in accordance with the findings herein above enumerated, the Court further FINDS that plaintiff worked [fol. 13] eighty-seven (87) hours per week from October 1 to October 24, 1940, which is 3-3/7 weeks, which under Section 7 (a) (2) was limited to forty-two hours per week.

The Court FINDS that plaintiff worked eighty-seven (87) hours per week from October 25, 1940 to October 6, 1941, which is 48-4/7 weeks, which under Section 7 (a) (3) was limited to forty hours per week; that the salary of One Hundred Fifty Dollars ($150.00) per month divided by the number of hours worked and time and one-half for overtime in violation of the provisions of this Act amounts to Four Hundred Eighty-seven and 44/100 Dollars ($487.44).

The Court further FINDS that under the provisions of this Act plaintiff is entitled to a like sum of $487.44 as liquidated damages and under further provisions of this Act is entitled to Attorneys' fees in the sum of $175.00.

WHEREFORE, the Court finds the issues in favor of plaintiff, Max Levinson, and against the defendant, Spector Motor Service, a corporation, and assesses said plaintiff's damages in the sum of $1,149.88 and costs sustained.

Accordingly, therefore judgment is now entered in the sum of $1,149.88 against the defendant Spector Motor Service, a corporation, in favor of the plaintiff, Max Levinson, together with the plaintiff's costs."

Defendant's Appeal Bond set as $1,500.00.

Defendant's written motion for new trial, filed January 7, 1943.

Defendant's motion in arrest of judgment, filed January 7, 1943.

ORDER OVERRULING MOTION FOR NEW TRIAL

Order entered January 7, 1943, denying defendant's motion for new trial.

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT

Order entered January 7, 1943, denying defendant's motion in arrest of judgment.

NOTICE OF APPEAL

Defendant's Notice of Appeal, filed January 13, 1943.

[fol. 14] Proof of service of notice, on January 13, 1943.

Praecipe for complete authenticated transcript of record, filed January 22, 1943.

Notice of defendant's motion, filed January 22, 1943, to approve Appeal Bond.

Order entered January 22, 1943, approving defendant's Appeal Bond, ordering that Report of Proceedings be approved and ordered filed.

Appeal Bond approved and filed January 22, 1943.

Stenographic report of proceedings, filed January 22, 1943.

Leave granted plaintiff to amend Statement of Claim.

REPORT OF PROCEEDINGS

MAX LEVINSON, plaintiff, called as a witness on his own behalf, testified as follows:

Direct examination.

By Mr. Yale:

I was first employed by Spector Motor Service in October, 1939. I checked, unloaded and received freight. I worked there until October 6, 1941. There are three phases to this Motor Service business—inbound freight, outbound freight and a city local. Inbound freight are trucks loaded with freight coming on from the East, that is, Spector Motor trucks coming in from the East. They operate from certain states, New York, Connecticut and so forth. The Spector Motor Company has a terminal located at 600 West 25th Street for receiving inbound freight. The inbound place is about a half block long connected with the office, and the trucks coming in back up against the terminal.

We usually work in gangs of three or four men together. One is a checker, one is an unloader and one is a wheeler. [fol. 15] The checker goes into the office, asks for bills to correspond with the load. He gets the bills from the terminal manager, gets his gang together, and they start unloading the freight on the terminal. The checker checks the freight, the sorter sorts it, and the wheeler puts the freight in separate sections in the terminal and is told by the checker where to put it. That is the inbound. Outbound freight was operated in the same manner, but mostly evenings after five o'clock, up to the early hours in the morning. With reference to outbound freight, there is during the day a collection of freight going to all points

east which they operate. It is received and put in the separate sections. At night, after four o'clock, the loading into trucks for outbound freight starts, which is done in the same manner by checkers, callers, sorters and packers. That is, operated mostly in a foreman's gang. The caller calls for so many pieces for so and so, the checker checks his bills, the sorter wheels it in, and the stacker stacks it according to the amount of space in the trailer. The checker determines the weight with respect to the amount of outbound freight. Outbound freight is loaded into Spector Motor trucks. With reference to local freight, a local carrier will come in with a load of freight going to the East, either with his own truck or a company truck. He pulls up to the terminal with the load of freight and hands the checker his bills. The checker calls his gang and unloads it. The wheeler takes it in. The checker is supposed to tell him where to put it. When everything is checked and found correct, it is up to the checker to mark it received and take it to the office to the rate clerk. The driver follows the checker into the office, and the rate clerk—who most of the time is the cashier—pays him for bringing in that [fol. 16] amount of freight. That is the method where the man that works for himself is hauling and gets so much a hundred for bringing in freight. That is the system with reference to local delivery. Local freight is accumulated on the terminal all during the day, and after four o'clock, we start loading it into the trucks for outbound to the eastern states.

I worked a year under the time clock system until October 1, 1940. During that year I was paid by drafts. No claim is being made for that period. On October 1, 1940, I went to Mr. Spector's private office where I found Mr. Spector, Mr. Arnold and myself. Mr. Spector said, "I am going to appoint you foreman. Things are not running so good. Of course, you know what the duties of a foreman are." I said, "What are they supposed to be in your estimation?" And he said, "Well, keep the payroll down, trying to get as much work as possible out of the men, and, of course, take care of the terminal, and above all, Jack Levinson is your superior." I said, "O. K." We were going to work on a three eight hour shift, and didn't want any more extra men if we could help it, like working on days and having to pay them at night. I went back upstairs again the same afternoon, showed Mr. Spector a

little illustration and what I had made out, and he said for me to go ahead. I called up the union and we started to put this three eight hour operations into effect. My job was to supervise. I was a checker, and I used to check the freight coming in, receiving, and I had a wheeler to wheel it and put it into the sections where I used to tell him, like Jersey, New York, and so on. I marked these bills received. I then took them into the office and gave them to the gate clerk, who in turn gave them to the biller, [fol. 17] and they were billed. Then I went outside and the same thing happened to other loads of freight that would come in. Hundreds of thousands of pounds of freight would come in during the day. The amount of time of my day's work on local freight would be like spurts. A little in the morning, a little in the afternoon, and it would amount to quite a few hours. With reference to incoming freight, we used to work in gangs. When it came in, I used to check the loads and then, in the morning, they were loaded out on the city trucks to be delivered in the city. That consumed quite a few hours of the day's work—about half a day I would say. The outbound freight was done mostly at night, beginning on an average about four or five o'clock at night. I was still there when the night foreman came in. He used to come between seven and eight o'clock. I did the same operation with reference to the outbound freight that we did with the other. I checked the freight while they were stacking it, and calling it and wheeling it. I had nothing to do with reference to carrying packages into the trucks on outbound freight. I used to hire the men, and it was my business to see that a man got an application, a time card, social security card, see that he punched his card on time when he started and got through at noontime and so forth. When a man wanted to quit, it was up to me to O.K. his time card and see that he got his pay. I gave the time cards to the young lady who figured out the time. After she figured the time she used to have me O.K. it and then there was a draft made out for this individual. I had to watch in case a man was off, to see that his time card was marked off. The regular men had a forty-eight hour guarantee.

We used to have a regular staff meeting every Wednesday night, which I attended, which would last two or three [fol. 18] hours up in the conference room, and we discussed the matters of the week. I used to have to confer with

Mr. Arnold a couple of times a week on account of the payroll, because he was the auditor. I had to watch that bills were made out right, sometimes there were mistakes in the weight, sometimes in the piece of freight. If anything of that kind happened, I had to go to the proper party to have it corrected in the office. I had something to do with reference to the lease operators. The terminal manager used to hire them and determine the price he would pay to take the loads out. Mostly these lease operators went to the East or to St. Louis. Then he would turn them over to me. I would see that they made out the lease, the application before we started to load them, and then turn them in to Jack Levinson for his approval. Then the men would start to load them. From October 1, 1940, I started to work on Sunday, and worked Sunday evening and Monday morning. I worked from Monday, 7:00 until about 7:00 o'clock at night. Sunday I worked about three or four hours. Tuesday, Wednesday, Thursday and Friday, I worked from 7:00 to 7:00. Saturday, I worked from 7:00 until about 3:00 or 4:00 o'clock Sunday morning. Saturday, I began work at 7:00 A. M., and worked until about 3:00 or 4:00 Sunday morning. I spoke with the terminal manager about the hours I was working beginning October 1, 1940, after a few months had passed. We had quite a few discussions about long hours. I told him that it was quite a lot of work and the hours were very long, and that my health was getting kind of impaired. He said he would send a recommendation upstairs. There wasn't anything done about it. Finally, close to the end of the year, I was put on nights, but I did not go to work nights. [fol. 19] October 1, 1941, we had a discussion again and he fired me. When I came to work after October 1st, and up to the time I was fired, the other foreman, Leo Gatz was there. There were no more than two foremen. He started between 7:00 and 8:00 o'clock. I left after he got there, because he had to relieve me. I had to tell him certain instructions, whatever went on during the day. I stated that outbound freight work started about 4:00 or 5:00 o'clock in the evening.

Cross-examination.

By Mr. Golden:

I was the day foreman. There are two types of inbound freight—one type is collected throughout the city of Chi-

cago, the other comes in from connecting carriers, either from the South, West or other parts of the country. Not only freight from the city, but freight from out of town comes in. It is inbound freight. Freight comes in from the East and from the West practically all day long. I work in both the outbound and the inbound division. Quite a few men worked on the dock who were directly responsible to me. I have charge of, say three or four gangs. Each gang consisted of three or sometimes four men. They all loaded and unloaded freight in the entire operation. There is a lot of checking, a lot of inspecting to be done to see that the packages are intact and have not been pilfered with. That is all part of the loading and unloading. If there is any discrepancy, there is an OSD made out, which means over, short and damaged. As these packages are taken off the trucks they are sorted in accordance with their destination, and it becomes necessary that these packages be put in piles, depending upon how many there are. I supervised how these packages were to be distributed, [fol. 20] into what sections and how they were piled. I watched everything that went on the dock. If I saw a man coming in who was drunk, it was part of my duty not to let him work that day. If I saw a man was improperly stacking packages so that they might fall down in the terminal and hurt somebody or break the packages, it was my duty to a certain extent, to correct him. While I was there, trucks, either Spector trucks, lease operators or interline carriers were loaded to go over the road. I wouldn't say these trucks were being loaded all day long. It just depends upon how much freight accumulated on the dock. If it becomes accumulated, then they start to load. On certain days they loaded it during the day while I was there. It isn't a very common thing to constantly load outgoing freight all day long, but at certain times it was being done. Some freight comes in from the East during the night, mostly it comes in during the day. I testified that about half my days was taken up in checking inbound freight. The other half was spent in checking, and supervising and so forth. To a certain extent a checker watches the loading of the truck and the distribution of the weight in the truck. While I was doing this work as a checker, it came to my knowledge on occasions that I had extremely heavy packages or pieces of machinery, or steel, or such heavy weights that had to be put in the truck. As a checker,

it was my duty to call them to the man who picks out the stuff for bottom freight or balloon freight. Bottom freight is heavy freight, and balloon freight is top freight that fills in the top. Balloon freight is put on the top because you couldn't put the heavy weight on top of the balloon freight, that is in order that the top freight shouldn't crush the bottom freight. There are many loads sent out with [fol. 21] an average weight of fifteen thousand pounds. At certain times they wanted to move faster so they filled it at an extra weight. To fill it out they put some light freight in. It may be small boxes where there is plenty of room in the trailer, and to fill it out to make it twenty thousand pounds. In other words, when they had a fifteen thousand pound shipment they put in balloon freight that weighed five thousand pounds more to fill out the twenty thousand pounds. As a checker, I didn't exactly know the weight capacities of the various vehicles. We had no scales at the time to weigh them. It is the duty of the checker to check the weight of the freight that goes into each trailer if it is possible. If a checker wouldn't check these weights I would know he isn't doing his duty, and I would reprimand him. The stacker is supposed to know the various weights of the various articles. I did not have charge of very much loading. The night man had charge of the loading. I had charge mostly of the city loading. Jack Levinson was my superior. He was not in the office all the time. I was in charge of all the men on the dock except my superior Jack Levinson during the day. These men that I was in charge of did nothing else but handle, load, unload, check and stack freight. I saw that things should go right. If any man did something wrong I tried my best to correct him and show him the proper and easier way to do it. There isn't very much stacking during the day. These men also loaded the city delivery trucks. They started in the morning and continued all day while I was there. City delivery means taking the freight out to any city. I was not exactly in charge of the gangs that loaded the city delivery trucks. Most of the city trucks were loaded before I got down so I [fol. 22] wasn't in charge of them in full. Some of the city delivery trucks were loaded in the morning while I was there, but there was not very much loading of any outbound freight while I was there. It took up quite a few hours. About thirty percent of my time was taken in supervising

loading. The other seventy per cent was spent in supervising the men, checking and so forth. I helped quite a bit there too. Working on a terminal you are a working foreman. He does everything. Jack had four or five of his own picked men out of the sixteen that I testified to. I was in charge of the balance of the men.

The night foreman had gone home about three or four in the morning before I came. He came on between 7:00 and 8:00. It isn't a fact that he usually came on between 5:00 and 6:00—very seldom. Some mornings I did and some mornings I didn't start at the same time as Jack Levinson. Sometimes I started before. Maybe about half the time I started at the same time as Jack Levinson did. Mostly I quit maybe fifteen minutes or a half hour before he did. To a certain extent Jack and I worked about the same number of hours. Sometimes he worked Sundays. I had off from Sunday morning until Sunday evening, unless we had a meeting. I worked from about 9:00 to 12:00 on Sundays. I worked Saturdays from 7:00 in the morning until 3:00 or 4:00 Sunday morning. I was a union man and paid my dues during all of that time. We had quite a few meetings on Wednesday nights. I attended most of them. I don't remember how many. I didn't count the number of meetings that I attended during the winter months. I don't remember missing any of them. It is not a fact that I attended only four of those meetings. I at-
[fol. 23] tended at least eight or ten or twelve. I did not negotiate or solicit any lease operators or try to get them. That was Jack Levinson's job. I saw that their leases were made out and their applications were made out. It isn't a fact that that was Jack Levinson's job. When he hired or contracted for the price of one, he used to turn them over to me, and I saw that they made out the application. We couldn't load until his application was made out, and O.K.'d by Jack. I did not have to O.K. the application. That was Jack's job. I can't remember how long it took to give him the application and take it back approved. It depended upon how long it would take the man to fill it out. I didn't fill it out for him. I did something else while he was filling it out. It isn't a fact that I used to wait around for him to drive me home. I did in my first year when I was working on the clock. In the second year one of the boys used to take me home most of the time.

Redirect examination.

By Mr. Yale:

These meetings used to take on an average about two or two and a half hours. I used to have dealings with the time cards of the employees mostly every day. I spent quite a few hours I would say every day, also at the end of the week.

Recross-examination.

By Mr. Golden:

I mean the time cards which the various men on the dock punched. I did not figure their wages. That was done by one of the girls in the office. I don't know the maximum number of cards. I took out the cards of the night crew at the end of the week. I used to go through them to see just about how many hours they put in. That was my [fol. 24] job. The day and night crew, and sometimes ten extra, amounted to forty cards. What I actually did was just glance through to see that they weren't over-estimating their limit. I then took the cards to the girl who figured out the time. It took me several hours a day to glance through those thirty or forty cards.

Redirect examination.

By Mr. Yale.

During the period from October 1, to October, 1941, I usually took a half hour for lunch.

Whereupon, the plaintiff rested his case.

Jack Levinson, called as a witness on behalf of the defendant, testified as follows:

I am transportation manager for Spector Motor Service, have been so employed for the last seven or eight months, and was terminal manager for a period of about three years prior to that.

As transportation manager, my duties are to see that the freight is properly received and loaded. I don't do any of the labor. I supervise the men under me, various fore-

men and checkers. From October 1, 1940 to October 6, 1941, my duties as terminal manager consisted of general management of the terminal, in charge of all of the employees in the terminal, but not the employees in the office. I hired plaintiff as an ordinary dock man at first, where he was paid on the regular basis as an extra man. Then he was put on the regular basis where he would check freight, receive freight, load freight, and so forth. On October 1, 1940, he was given a permanent job as dock foreman. I was his superior and gave him orders and naturally was to look out for things that he wouldn't expect—[fol. 25] stealing in the terminal or thefts. He had something to do with the loading or unloading of vehicles. As a man in charge of a gang, he would have authority to direct the men as to how they were to put certain freight in a certain piece of equipment or vehicle. That came to an end and he was put in charge of a gang of men with the duties of loading and unloading and O. S. D. reports, and so forth, the same as any other man in that position would have. This position is called a checker. During that short period of four or five weeks, Levinson had authority to hire and fire. He had nothing whatsoever to do with the payroll. He did not check any payroll cards, that was done by a clerk in the office. He had nothing to do with the leased operators during that five week period, except to have conversation with them. It might have consisted of saying "hello" or "goodbye." He did not check their applications. During the period that he had authority to hire and fire, he checked applications for the dock men. The period that he had that authority did not extend over ten weeks. The only occasion Mr. Levinson had of making out lease operators' leases was when the night man would be off, and he would be asked to fill in. That might have happened two or three times, and I doubt whether it happened that often. It would take about five or ten minutes to fill out that application. During that four to eight weeks, his supervision consisted of hiring and firing men; he had authority to tell me whom he wanted in the terminal which was the same as hiring and firing. He would walk through the terminal, point out to the men that they were not working fast enough, or should load it this way or another way. He would tell them how to stack the freight in the terminal, where to put it, the way to lay it [fol. 26] in a room, and so forth. He wouldn't show them

what freight to put in, the bills were already routed by a man ahead of him in the office. Most of the work was always on the day shift. He did work nights for a short time, but that was towards the end. I used to drive him to work between 7:00 and 8:00 o'clock. His hours were through at 4:00 or 5:00 o'clock, depending on what time he got to the terminal, but he would wait for me to drive him sometimes to 8:00, 9:00, and sometimes 10:00 o'clock. The night foreman came on between 5:00 and 6:00 in the evenings. During the times Max Levinson was on duty, the work on the dock consisted of unloading trucks which had arrived from the East or St. Louis or the West. There was occasionally loading to be done of city equipment, and there was also loading of outbound equipment. During that eight week period he was in charge of all the crews. After that eight week period the work of firing was taken away, and he was put into work with a gang. During that eight week period, Max Levinson called the union with reference to workmen. After the eight week period he had no more to do with it. With respect to loading, his duties were to see that certain freight was put on top, certain freight on the bottom, certain positions in the truck for certain pieces of freight. The checker has the bills on which appear the name of the shipper, consignee, number of pieces, weight, commodity, and so forth. The weight and commodity absolutely have to do with reference to the position in which it should be placed in a truck.

Max Levinson attended about four of these Wednesday night meetings that were testified to here. Our meetings took from about 7:00 o'clock to 9:00 or 10:00 o'clock in the evening. He did not attend any of these meetings after that eight week period when he acted as a foreman.

[fol. 27] Cross-examination.

By Mr. Yale:

The secretary, Oliver J. Arnold kept a record of the attendance at those meetings. Those who attended were listed as being present. I am not an executive of the Spector Motor Service. I was present at all of the meetings held by the company. He did not handle the time cards. That was done by a clerk in the office. Her name was Delores Evans. There was no one there that figured time

cards besides myself or some assistant? Max Levinson did not handle time cards even after he was made foreman. I was always directly responsible for the loading or unloading of merchandise for shipping or stacking in a terminal, but I had no active physical duties with regard to it. I instruct the gangs that work on the loading or unloading, as to how to do it, and when to do it, I would issue instructions on how to stack. The process of checking consists of weighing one piece or ten pieces, putting on notations to that effect, noting shipper's name, consignee's name, commodity, if possible, and approximate weight. If you are loading, where to put it in the truck, how to put it in the truck. The checker usually stands at a checking table. He may help his men, if they need assistance. A gang consists of four men. The loader will load L T L shipments. That means less truck load shipments. He sets the freight into the truck. If there is anything wrong with the weight, it is up to the checker of the gang to instruct him how to do it. The stacker and loader are the same. The caller calls the freight from the floor or from the truck, whatever it might be and sets it up for a wheeler or trucker to take into the truck. Max Levinson did not have anything to do with lease operators after he became foreman. Lev- [fol. 28] inson knew that he was deposed as foreman when he was put on a gang and was given three men to work with. I did not testify that Mr. Levinson gave instructions to inbound drivers as to what speed to use while driving in the city. I would say that practically all day long you have as much inbound freight as you have outbound. Our inbound freight is usually handled during the night, from midnight to morning, and outbound is concentrated more or less between 8:00 A. M. and 12:00 midnight. I drove Mr. Levinson to work practically every morning between 7:00 o'clock and 7:30. I drove him home any time between 7:00 and 9:00 o'clock at night. He was waiting for me at night to take him home. He would wait 2, 3, 4 hours. He would not be working up until two hours before 7:00 to 8:00. He worked until 5:00 o'clock. There may have been times he waited for four hours. I couldn't recall. He waited almost his entire stay at the Spector Motor Service. His hours were through at 5:00 o'clock. He had the liberty of leaving then. He did not work and he did not leave. At that time, he had an hour for lunch.

I came down here because I happened to be Max Levinson's superior at the time he was employed. I have never quarreled with him regarding this claim. He did call on me on one occasion. I never talked to him about filing this claim. I called you (Mr. Yale) and told you I was going to stop him from getting a job anywhere because of making this claim.

Redirect examination.

By Mr. Golden:

Max Levinson's home was between my home and the Spector Motor Service. There were a number of times when a man had been placed in one gang was shifted to another, from time to time.

[fol. 29] Ted Jarvis, a witness called on behalf of the defendant, testified as follows:

Direct examination:

By Mr. Golden:

Mr. Jack Levinson has been my superior throughout the time I have been employed by Spector Motor Service as a checker, loader, in fact, everything pertaining to handling freight. During all the time between October 1, 1940, and until Max Levinson left, I had an opportunity to observe what he did. He was known as a checker of the gang. He had charge of four men in his crew. There was a period of a month or a month and a half when he was known as the dock foreman. That is what he told us and he was just bossing the other gangs to the effect of what to do. He came out with a bunch of way bills and would tell a certain gang to load this truck either for city delivery or trailer, or he would come out with way bills that he got with a load from the East, and give it to the gang and tell them to unload it in the house, and after it is in the house they routed the bills according to different parts of the city, and he would tell them to load the freight for that certain section. A checker's table is an ordinary table that we move all around the dock wherever the work has to be done. During the period he acted as foreman, he would

give the gang the bills, tell them to load certain trailers or trucks, whichever the bills were marked for after the city dispatcher had them routed in the different sections in the city. He also told them with reference to loading of city and out of town trucks. He supervised the loading and the unloading, seeing to it that the load was properly stacked. He was there a little longer, I imagine, than [fol. 30] I, because he would hang around after he was through. After he was no longer a foreman he did the same job as the other checkers in the terminal, checking freight, loading freight. You have to load just so much into the trailer, and the load has to be properly distributed. The stacker or stower, stows it in there, puts whatever the checker wants to go in there because, as I say, we just put so much weight into the trailer and not any more, but it is to be certain freight. If it is not suitable for one trailer it may be put into another. The stacker may call for some balloon—by balloon I mean light freight—then we have bottom freight—heavy freight. We put the bottom freight in first, then we put in some balloon—that is the lighter parcels.

Cross-examination.

By Mr. Yale:

The day before yesterday was the first time that I ever heard about this case, when Mr. Golden said we have to come to court next day. I never made a claim against Spector Motor Company for overtime. I was never paid for overtime. Jack brings the bills out to us from a dispatcher in the office. The truck driver brings them in because he has to be checked in. Then it used to be the city dispatcher that used to give them out. Then we take that bunch of bills and start giving orders for loading or unloading, whatever it may be. I would say that there was half loading and half unloading in the city house. That is with reference to outbound and inbound freight. Mr. Levinson had a little of hiring and firing to do for the period he was there. I have nothing to do with lease operators. I load their trailers if that is what you are referring to. I have nothing to do with leases. I don't [fol. 31] have anything to do with the rate clerk. I have nothing to do with time cards other than my own. As a checker I never had occasion to attend meetings of the com-

pany's personnel. As a checker I do not have any dealings with Mr. Arnold. It is not my duty in any way to O. K. time cards or distribute drafts to the employees and I would not know if he did it. I think Mr. Levinson called the union for help a couple of times. I wouldn't know whether he had any dealings with Mr. Arnold, or any dealings with reference to leases and lease operators. I would not know whether he had anything to do with Miss Butz with reference to figuring up time of each dockman.

Redirect examination.

By Mr. Golden:

I never saw Max Levinson figure any time cards while I was there. I never saw him make any leases with lease operators while I was there. He was out on the dock, except when he sat in the office.

SAM FISHMAN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Golden:

I remember the period he worked there before October, 1940. His position was changed, he got to be a boss. He was directing the work on the dock for a couple of months. He wanted us to load the trailers his way and break them down his way. By breaking down I mean putting weight on a certain spot in the trailer so that it wouldn't overweigh the trailer. Breaking down means taking the weight off the trailer and putting it in sections of the house. He told us where and how to put it in the different sections. [fol. 32] Before he became a boss Mr. Levinson worked on the dock doing everything. He also did loading. In October, 1940, he became a boss or supervisor or foreman—it was just a couple of months. During the time before he got fired, and between the time he was a foreman, he was a checker. We started working together about six months before he was fired and I worked with him in a gang up to the day he was fired. When Mr. Levinson was working with me in the gang, the cashier figured the payroll. I

have not seen Mr. Levinson ever figure payroll, nor figure time cards. I never noticed anything about his hiring or firing help. During the six months that I worked with him I never saw him make out leases with lease operators. During the six months I was with Max Levinson when he first started we used to have a night shift, then we started at 8:00 o'clock in the morning. We used to work from 8:00 to 4:30. Sometimes we worked overtime a little until 6:00 or 7:00 o'clock. Max Levinson and I started together and quit together during those hours. We used to have a half hour for lunch. In the beginning we had Sunday off, then started on Wednesday off. They changed it. During all of the time that I worked with Max Levinson we worked six days a week. In the beginning Max Levinson was on the night shift with me. That was after he was a boss. He worked a couple of months on nights. I was with him on the night shift and during all of the period until he got fired.

Cross-examination.

By Mr. Yale:

I worked a couple of months at night with Max. I couldn't tell you exactly when they began and when they ended. I know that he was checking on my gang. That [fol. 33] is the only thing I know. I don't know anything else. I think we used to start work at 7:00 in the morning till 4:30. They changed it. That was about six months before he was fired, and then we worked days, and after that they changed us on nights again. I don't remember exactly whether on October 1, 1940, we started at 7:00 or 8:00. Levinson wasn't working with me October 1, 1940. Until six months before he was fired he did not work with me. Up to that time I don't know what he did or didn't do. I used to get to work with Levinson. He used to be there when I arrived. Then we left about 3:00 or 4:00 in the afternoon—me and him and the whole gang, four men in the crew. All four of us used to start together and leave together. He used to come ahead of me. He used to come with Jack Levinson all the time, drive down. I don't know whether he was working on the time cards. I don't know anything about whether he was working on the leases for lease operators, nor whether he was working on checking bills. If he called up the union for help before

I got there I wouldn't know about that. I don't know of anybody he hired. He told me where to put the freight in the house, in the sections. The loading and unloading during any day was about fifty-fifty.

WILLIAM A. PROKOP, called as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Golden:

I got on Max Levinson's gang. I remained on his gang until he quit. I can't tell offhand when that was. He was working directly with me and was the boss. He was practically the boss of the whole dock at that time, dock foreman until he quit. He also worked on the gang and directed my gang and other gangs. He started working with me in the morning at 6:00 o'clock and sometimes at 7:00 o'clock, and worked until 3:30 or 4:00 in the afternoon, sometimes 5:00. We worked nine hours, sometimes ten hours a day. I never worked on the night shift during Max's time. I worked on the day shift the whole time. A checker's duty is to see that the loads are properly loaded and checked out and the goods taken in or given out according to the bill of lading, and the loads properly loaded and unloaded.

[fol. 34]

Cross-examination.

By Mr. Yale:

As a checker you have to see that the freight is checked according to the sections in the terminal and according to the places it has in the truck. You also check with reference to the correctness of the amount of freight as against the amount of charges. To determine whether the amount of weight is correct as given, I look at it, check it up, and if the weight is approximately right, you check it off, but if you have any added weight, the weight isn't right, you go and weigh it over and change the weights. We have no authority to change the rates or anything. We just see that the weights are right. Naturally when we have checked the weights it has something to do with the rates or prices.

It is very seldom that the weights are not right on the bills. The main thing of checking is the shortage of pieces, not the weights so much. To make out the O. S. D., that takes time. O. S. D. means over, short or damaged. We make out a form, whatever it is, short or damaged or over, and leave it go through the regular routine. Of the nine hours a day it sometimes takes five minutes, sometimes an hour to go [fol. 35] through these processes as a checker, if we get a lot of shortages, it takes a lot of time, but, as a rule, we don't have much of it nowadays. We do that on inbound as well as on outbound freight. I have a stacker in my gang whose business it is to stack freight so that everything is O.K. I suggest to him the different points and then we restack it. The time consumed in loading for outbound and for loading inbound, stacking up in the terminal, equals about fifty-fifty. When I first started at Spector Motor Company I got to work at the same time Mr. Levinson did. He was always there when I got there. I left ahead of him after my day's work. I wouldn't know whether Mr. Levinson made a call to the union. If he would be doing anything with reference to a lease I wouldn't know about that, nor whether he was handling time cards of employees. Practically all the workers, the whole organization, are now invited to what they call public meetings. They used to be called once a month regular.

Max Levinson, the plaintiff, being recalled as a witness on his own behalf, testified as follows:

Direct examination.

By Mr. Yale:

I heard the testimony of Jack Levinson. He did not say to me, about a month or two months after October, 1940, that I was fired as a foreman. He did not say anything about my being fired as a foreman until October 6, 1941. I did not, after a month or two of being foreman, start working with any particular gang as a checker. I worked all the time as a checker. I used to help them out. I used to pitch in with any of the gangs. A foreman on a terminal is a working foreman. I did not stop working on the time cards at any [fol. 36] time during October 1, 1940, and October 6, 1941. During that period I did not stop hiring and firing. I did

not on any day during October 1, 1940, to October 6, 1941, wait two or four hours to have Jack Levinson take me home. During that period I lived about five miles from the terminal. It takes thirty to forty minutes to get home with the street car. He did not take me to work every morning. Private Sorenson took to work lots of times.

Cross-examination.

By Mr. Golden:

I said that during the period from October 1, 1940, to October 6, 1941, until I was no longer in the Spector employ, I was a working foreman. I worked from 7:00 in the morning to 7:00 in the night; sometimes later than that, it all depended on just what the work was. I worked seven days a week. I had Sunday mornings off unless there was a meeting. I worked those twelve hours a full day except a half hour for lunch. I was a working foreman, pitched in and did everything that was necessary on the dock. I hired and fired men. I did not hire or fire any office help, had nothing to do with the office.

The men I hired did loading, checking, wheeling and stacking. I would reprimand a employee for anything wrong but didn't fire. This was up to Jack Levinson. I used to walk around and watch the terminal.

I did not think it was necessary to go around and look at the loads on the city trucks. There were no other working foremen on duty at the time I was on duty. I did mostly checking. I said that I checked the time cards sometimes Friday, sometimes every other day. Sometimes I had occasion to call the union for help twice during the day. That conversation would take fifteen minutes, a half hour, it just [fol. 37] depends. I would deal with two, three or four lease operators going to St. Louis, mostly. It would take an hour or two to get them all in shape. I was not with the operator an hour or two, and it would not take an hour or two to fill it out. I would have to see that it was O.K. It took me about a half hour for each man.

Redirect examination.

By Mr. Yale:

I said I worked twelve hours every day except Saturday. Saturday I worked from 9:00 in the morning until the early hours Sunday morning. Nineteen or twenty hours on

Saturday, something like that. On Sundays I worked from 9:00 to 12:00 in the evening, three hours. All the other days, twelve hours.

Whereupon, both sides rested their case.

Which was all the evidence offered or received on the trial of the above cause.

Certificate of trial judge, dated January 22, 1943.

Certificate of the Clerk of the Municipal Court of Chicago.

Respectfully submitted, Yale & Yale, Attorneys for Appellant.

[fol. 38] **Abstract of Appellate Court Record**

Certificate of Appellate Court that the attached transcript of record marked 42651 is the original record filed in said Court on March 3, 1943.

Placitas.

Order of Court entered March 18, 1943, assigning this cause to the Third Division of the Appellate Court.

Order entered April 14, 1943, granting Appellee 30 day extension of time from April 16, 1943 to file briefs.

Order entered May 5, 1943, taking this cause under advisement.

ORDER OF REVERSAL

Order entered June 30, 1943, that the Court being of the opinion that there is manifest error in the record and proceedings of the Municipal Court in the rendition of the Judgment, said Judgment is reversed and annulled and that this cause is remanded to said Municipal Court with directions to enter Judgment for costs for defendant and to be taxed against plaintiff and that defendant have execution therefore.

ORDER DENYING PETITION FOR REHEARING

Order entered July 24, 1944, that the petition of appellee praying for a rehearing be denied.

ORDER GRANTING LEAVE TO APPEAL

Order entered July 24, 1944, reciting that the court during the June term having considered appellee's petition for leave to appeal to the Supreme Court of Illinois and having considered the counter suggestions of appellant, it is the

opinion of the court that this cause involves questions of law of such importance on account of principles and collateral interests that it should be passed on by the Supreme Court and that, therefore, leave to appeal be allowed to said Supreme Court of Illinois.

[fol. 39] Certificate of Appellate Court Clerk certifying that the foregoing is a true copy of the final order, Judgment and all proceedings in this cause.

Respectfully submitted, Yale & Yale, Attorneys for Plaintiff-Appellant.

Harry L. Yale, Of Counsel.

[fol. 40] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eleventh day of September in the year of our Lord, one thousand nine hundred and forty-four, within and for the State of Illinois.

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

And Afterwards, to-wit, on the 30th day of September, 1944, the same being in vacation after the term of Court aforesaid, there was filed by Appellee herein an Additional Abstract of Record, which is in the words and figures following, to-wit:

[fol. 43] IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, A. D. 1944

MAX LEVINSON, Employee, Plaintiff-Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corporation, Defendant-Appellee

Appeal from the Appellate Court of Illinois, First District, on Certificate of Importance

There Heard on Appeal from Municipal Court of Chicago Honorable Wendell E. Green, Judge Presiding

Additional Abstract of Record—Filed September 30, 1944

OMITTED PORTIONS OF PLAINTIFF'S STATEMENT OF CLAIM

Defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri and licensed to business in Illinois, and at all times hereinafter mentioned was and is engaged in the business of motor transportation of freight for interstate commerce in and through all the eastern states of America.

* * * * * * *

That beginning with the aforesaid date of October 1, 1940, plaintiff was paid on a different basis than that for which he was paid previously, namely, $150.00 per month.

[fol. 44] OMITTED PORTIONS OF DEFENDANT'S AMENDED DEFENCE

* * * * * * *

This defendant further denies that the plaintiff is entitled to recover the sum of Four Hundred Eighty-Seven Dollars and Forty-Four Cents ($487.44) or any other sum whatsoever.

* * * * * * *

Admits that it is engaged in the business of an Interstate Common Carrier of freight by motor vehicle, and as such is in Interstate Commerce.

* * * * * * *

That the defendant denies that it employed the plaintiff for the number of hours set forth by him in his Statement of Claim, and states the fact to be that it paid to the plaintiff all salaries or wages due to the plaintiff for any and all services or work performed by the plaintiff for and on behalf of the defendant.

* * * * * * *

MOTION FOR NEW TRIAL

Defendant's written motion for new trial, filed January 7, 1943, as follows:

"Now comes the defendant, Spector Motor Service, Inc., by Golden & Golden, its attorneys, and moves the court to grant said defendant a new trial, and for grounds of said Motion, shows to the court the following:

1. The finding and the judgment of the court are, and each of them is contrary to the evidence.

2. The finding and the judgment of the court are, and each of them is contrary to the law.

3. The finding and the judgment of the court are, and each of them is contrary to the law and the evidence.

4. The finding and the judgment of the court are, and each of them is contrary to the preponderance of the testimony.

[fol. 45] 5. There is no evidence in the record to sustain the finding or the judgment of the court.

6. The testimony shows that the plaintiff is not included within the class of employees provided for by Section 7, or any other Section of said Fair Labor Standards Act of 1938.

7. The testimony shows that the plaintiff is included within the class of employees who are specifically exempted from the operation of said Fair Labor Standards Act of 1938, by Section 13 of said Act, particularly sub sections (a) (1) and (b) (1) and (2).

8. The court is without jurisdiction to enter the judgment herein for $1,149.88 on the pleadings, because the ad damnum limits the amount of possible recovery to $500.00.

9. There is no evidence in the record to sustain the finding or the judgment of the court.

10. The court erred in denying defendant's Motion at the close of the plaintiff's evidence, to find the issues against the plaintiff and in favor of the defendant.

11. The court erred in denying defendant's Motion at the close of all the evidence, to find the issues against the plaintiff and in favor of the defendant."

* * * * * * *

MOTION IN ARREST OF JUDGMENT

Defendant's motion in arrest of judgment, filed January 7, 1943, as follows:

"Now comes the defendant, Spector Motor Service, Inc., by Golden & Golden, its attorneys, and moves the court in arrest of judgment, and for grounds of said Motion, shows to the court the following:

1. The finding and the judgment of the court are, and each of them is contrary to the law.

2. The court is without jurisdiction to enter the judgment herein for $1,149.88 on the pleadings, because the ad damnum limits the amount of possible recovery to $500.00.

[fol. 46] 3. The court erred in denying defendant's motion at the close of the plaintiff's evidence, to find the issues against the plaintiff and in favor of the defendant.

4. The court erred in denying defendant's Motion at the close of all the evidence, to find the issues against the plaintiff and in favor of the defendant."

* * * * * * *

REPORT OF PROCEEDINGS

MAX LEVINSON, plaintiff, called as a witness on his own behalf, testified as follows:

Direct examination.

By Mr. Yale:

I started working for Spector Motor Service October 1, 1939, and was paid by cash. I punched a time clock to show the number of hours I worked. I was paid with a draft.

I worked a year under the time clock system until October 1, 1940. During that year I was paid by drafts. No claim is being made for that period. On October 1, 1940, Jack Levinson, the dock terminal manager, called me into the office and said that Mr. Spector would like to see me.

. . . . . .

I said, "O.K."

. . . . . .

"Mr. Arnold asked what I would suggest to keep the payroll down," and I said, "Let's put in three eight hour shifts." Mr. Spector told me to go on downstairs into the office and figure things out. He said we were going to work on a three eight hour shift, and didn't want any more extra men if we could help it, like working on days and having to pay them at night, and so forth and so on. I went downstairs and started to figure the thing out, and went back upstairs again and told Mr. Spector that I had it all [fol. 47] arranged, and so forth and so on. Mr. Spector called me about noon time. The conference lasted a couple of hours.

. . . . . .

I had a conference with Jack Levinson, and we figured this thing out and he seemed to approve of it. The next day I got a card from Jack Levinson which he requested me to fill out. I asked him what it was for, and he said that from now on I was an executive and was put on the personnel payroll, and would be paid semi-monthly. With reference to my salary, Jack came down from upstairs and told me that I would now receive One Hundred Fifty Dollars a month, and would be paid twice a month. I continued on with my duties as a foreman. My job was to supervise.

. . . . . .

I did nothing else with reference to the bills.

. . . . . .

The regular men had a forty-eight hour guarantee. They were allowed forty-eight hours according to union rules, so I had to watch all that.

. . . . . .

I omitted one thing in stating what I did while working as a foreman. When this personnel card was offered to me and I filled it out, Jack Levinson, the general manager, told me that I would not have to punch any card any more. From October 1, 1940, to October 6, 1941, I did not punch a card. After October 1, I did not get paid with drafts, but was paid by check from the office upstairs. The executives get paid by checks from Spector Motors.

. . . . . .

Finally, close to the end of the year I was put on nights. I worked nights for a few weeks. No, he put me on nights but I did not go to work nights.

. . . . . .

[fol. 48] I don't remember whether I had any vacation during the time I was working for Spector Motor Company from October 1, 1940 to 1941.

. . . . . .

Cross-examination.

By Mr. Golden:

We are primarily concerned with that period commencing October, 1940.

As a foreman, I said my duty was to supervise the men. Spector Motor Service had two foremen. One day foreman and one night foreman.

. . . . . .

I was the head man on the dock.

. . . . . .

The checker is at the head of a gang loading a truck.

. . . . . .

I supervised these checkers and also acted as checker.

. . . . . .

I hired all the help and never took on any green help. The place where the freight is received, sorted and sent out is a terminal. I had charge of that entire space.

. . . . . .

During the day I was in charge of every man on the dock except the men who were superior to me. The only man superior to me on the dock was Jack Levinson.

. . . . . .

About thirty or forty per cent of my time was taken in loading. The other sixty per cent was spent in supervising the men, checking and so forth.

. . . . . .

I was in direct charge of all the men who loaded and unloaded vehicles during the hours which I spent at the terminal or dock.

. . . . . .

I said that a working foreman on the dock does practically everything. He helps out in case a man is short, in case [fol. 49] you can't get a man, and so forth. He mostly takes the responsible job, just checking. If a checker is a competent man, he is the man in charge of the crew that either loads or unloads. He kind of directs operations.

. . . . . .

The night foreman came on between 7 and 8, I guess.

. . . . . .

During the time I worked as a foreman, I worked pursuant to the union contract.

Redirect examination.

By Mr. Yale:

. . . . . .

I don't recall anything with reference to a vacation.

. . . . . .

(Defendant's written motion, at close of plaintiff's evidence, for judgment in favor of defendant, and order overruling same, *cf.* rec. pp. 36 and 38.)

. . . . . .

JACK LEVINSON, called as a witness on behalf of the defendant, testified as follows:

* * * * * * *

Prior to that, I was employed in the transportation business by Gregg Carloading and Distributing Company. In all, I have been in the transportation business about eleven years. I have been a loader, unloader, checker, caller, and so forth.

* * * * * * *

On October 1, 1940, he was given a permanent job as dock foreman. There was a raise of salary in connection with that.

* * * * * * *

He would instruct the men the proper procedure for loading, where to put it in the truck which would result in the equipment moving safely over the road, if it were over the road equipment, or of the speed at which a local delivery [fol. 50] driver might effect his actual deliveries in the city. He would show them how to load up the city delivery trucks.

* * * * * * *

He usually came down with me. I used to drive him to work between 7:00 and 8:00 o'clock. We had no specified time. His hours were through at 4:00 or 5:00 o'clock, depending on what time he got to the terminal.

* * * * * * *

There was loading of both inbound and outbound equipment during the day. Max Levinson was in charge of his own crew that had that loading.

* * * * * * *

After the eight week period, his position was that of dock checker or freight checker, whose duties are to supervise the men working under him, the proper way to unload the truck, where to put the freight, how to load the freight, and how to stack it in the truck. With respect to loading, his duties were to see that certain freight was put on top, certain freight on the bottom, certain positions in the truck

for certain pieces of freight. He had charge of that. It's up to the checker to use his discretion. Too many cooks will spoil a pie. It's up to the checker to do that, not the other three men.

Cross-examination.

By Mr. Yale:

. . . . . .

The fourth man is the checker, in charge of the gang.

. . . . . .

I would say that practically all day long you have as much inbound freight as you have outbound. That applies during the day as well as during the night, there is as much inbound and outbound freight moving both day and night.

. . . . . .

[fol. 51] Ted Jarvis, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Golden:

. . . . . .

I was employed by Spector Motor Service in January of 1940, and have been continuously employed by them since as a checker, loader, in fact, everything pertaining to handling freight. Loading and unloading freight, all phases connected with it, and have been on both the day shift and night shift while Max Levinson worked there. He worked nights when I worked nights, and I worked days when he worked days also.

. . . . . .

I worked there an average of ten hours a day, and he was there when I was there. I never saw him do any office work—sitting at a desk.

. . . . . .

He supervised the loading and the unloading, seeing to it that the load was properly stacked and packed so that it

would ride safely. The checker's main job is to see that the load is properly stacked.

. . . . . .

The checker is the head of these gangs. He is responsible for everything, the weight, seeing that the load is properly stacked so that it rides safely on the highway. If it is not properly stacked it is a safety hazard, because it sways. As the load rides a certain number of miles, it will shift in there.

. . . . . .

I would say that was half loading and half unloading in the city house, that is with reference to outbound and inbound freight. It is about fifty-fifty.

[fol. 52] Sam Fishman, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Golden:

. . . . . .

A checker has charge of each gang. He carries the bills, he stands by the table. He tells the others what to do. He wants it his way. He knows the weights. I don't remember exactly how long before he was fired Max Levinson acted as a checker, but he was a checker right up to the time he was fired. He wasn't foreman up until the time he was fired. I worked all shifts, nights and days, alternately from one to another.

. . . . . .

I was with him all during this time, and had a chance to see what Mr. Levinson was doing.

. . . . . .

William A. Prokop called as a witness on behalf of the defendant, being duly sworn, testified as follows:

. . . . . .

Cross-examination.

By Mr. Yale:

. . . . . .

As a checker I see that the load is loaded right, even if the stacker is there. I suggest to him the different points and then we restack it.

. . . . . .

We both started at 7:00 o'clock or 6:00 o'clock, whatever time he told us to start. We worked there until Max Levinson told us to quit. He was the boss there. He was the one that told us when to start and when to quit. He told our gang as well as the other gangs.

. . . . . .

[fol. 53] Max Levinson, the plaintiff, being recalled as a witness on his own behalf, having been previously sworn, testified as follows:

. . . . . .

Cross-examination.

By Mr. Golden:

. . . . . .

Q. Did you fire any men?
A. I did, some.

. . . . . .

Order re Original Report of Proceedings

Order entered January 22, 1943, granting motion of defendant that the original report of proceedings at the trial may be incorporated in the transcript of the record on appeal.

Respectfully submitted, Golden & Golden, Attorneys for Defendant-Appellee.

Joseph L. Golden, Maurice P. Golden, David Axelrod, Harry J. Lurie, Of Counsel.

[fol. 54] And Afterwards, to-wit, on the 28th day of October, 1944, there was filed by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, a Motion for Leave to File Brief as Amicus Curiae, and Suggestions in Support of said Motion, which are in the words and figures following, to-wit:

[fol. 55] In the Supreme Court of Illinois, September Term, A. D. 1944

No. 28309

Max Levinson, Employee, Plaintiff-Appellant,

vs.

Spector Motor Service, a Corporation, Defendant-Appellee

Appeal from the Appellate Court of Illinois, First District, on Certificate of Importance

There Heard on Appeal from Municipal Court of Chicago
Honorable Wendell E. Green, Judge Presiding

Motion for Leave to File Brief as Amicus Curiae

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, moves for leave to file a brief as amicus curiae in the above entitled cause. The granting of the Administrator's motion will not unduly delay the adjudication of the rights of the parties. Suggestions in Support of this motion are filed herewith pursuant to Rule 49 of the Rules of the Supreme Court of Illinois.

Douglas B. Maggs, Solicitor; Bessie Margolin, Assistant Solicitor; Kenneth P. Montgomery, Regional Attorney; Sidney A. Jones, Jr., Attorney, Attorneys for L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor.

[fol. 56] IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, A. D. 1944

No. 28309

MAX LEVINSON, Employee, Plaintiff-Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corporation, Defendant-Appellee

Appeal from the Appellate Court of Illinois, First District, on Certificate of Importance

There Heard on Appeal from Municipal Court of Chicago Honorable Wendell E. Green, Judge Presiding

SUGGESTIONS IN SUPPORT OF MOTION OF L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The suggestions made herein are set forth in support of the motion of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, to file a brief as amicus curiae herein.

1. This case comes before this court on a Certificate of Importance from the Appellate Court of Illinois, First District. The Appellate Court reversed the judgment of the Municipal Court of Chicago entered in favor of the plaintiff-appellant in an action brought under Section 16(b) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201, hereinafter referred to as "the Act".

2. The Administrator is charged with the duty and responsibility of enforcing the Act. His interest is the public interest expressed in a remedial statute of great importance, designed to correct and eliminate substandard labor [fol. 57] conditions in industry engaged in interstate commerce or in the production of goods for interstate commerce. In his capacity as Administrator, he has been and is advising employers and employees of the applicability of the Act and the interpretations placed upon the various provisions of the Act and from time to time has announced and is announcing his enforcement policy with reference to

general or particular situations. Since he is charged with the duty and responsibility of administering and enforcing the Act, he has a real and substantial concern in the interpretations and rulings that may be made in employee suits and the effect they may have on the administration of the Act. It is the Administrator's responsibility under Section 11(a) to commence actions under Section 17 to restrain violations of the Act. He must determine under what circumstances he will commence such an action.

3. The suit in the Municipal Court involved questions concerning the proper interpretation and application of the Act which are of public interest and importance. This appeal, likewise, presents questions concerning the proper interpretation and application of the Act which are of public interest and importance. The applicability of the Act to the plaintiff in this case and to employees similarly circumstanced throughout the United States is of importance in the administration of the Act.

4. This case involves the interpretation of Sections 204(a)(1) and (2) of the Motor Carrier Act and of Section 13(b)(1) of the Fair Labor Standards Act. A determination of the questions involved in this cause will of necessity affect the administration of the Fair Labor Standards Act and the enforcement policy pursued by the Administrator. The decision in this case will affect thousands of employees of motor carriers throughout the State of Illinois and will indirectly affect hundreds of thousands of employees throughout the country.

[fol. 58] 5. The brief which the Administrator desires to present to the court deals with the following issue: Is a motor carrier employee, who performs *any* duties with respect to the safety of operation of motor vehicles, exempt from the overtime provisions of Section 7(a) of the Fair Labor Standards Act of 1938, by virtue of Section 13(b)(1) of said Act in conjunction with Section 204(a)(1) and (2) of the Motor Carrier Act of 1935?

6. The point involved is one of first impression. The point decided by the Appellate Court in this case had not previously been decided by any Appellate Court in the State of Illinois and has never been decided or presented to this court. Likewise, the point has not been decided by the Su-

preme Court of the United States or by any United States Circuit Court of Appeals:

It is therefore respectfully submitted that the motion to file a brief as amicus curiae should be allowed.

Douglas B. Maggs, Solicitor; Bessie Margolin, Assistant Solicitor; Kenneth P. Montgomery, Regional Attorney; Sidney A. Jones, Jr., Attorney, Attorneys for L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor.

[fol. 59] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of November in the year of our Lord, one thousand nine hundred and forty-four, within and for the State of Illinois.

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal.

Attest:

Earle Benjamin Searcy, Clerk.

And afterwards, to-wit, on the 14th day of November, 1944, being one of the days of the term of court aforesaid, the Court having considered the Motion by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, for Leave to File Brief as Amicus Curiae and the Suggestions in Support of said Motion, Doth Deny said Motion.

[fol. 60] And Afterwards, to-wit, on the 27th day of November, 1944, an Order of Submission was entered by this Court herein, which is in the words and figures following, to-wit:

[fol. 61] No. 28309

LEVINSON, Employee, Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corp., Appellee

Appeal from Appellate Court, First District

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause

is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 62] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 8th day of January in the year of our Lord, one thousand nine hundred and forty-five, within and for the State of Illinois.

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal.

Attest:

Earle Benjamin Searcy, Clerk.

And afterwards, to-wit, on the 17th day of January, 1945, the same being one of the days of the term of Court aforesaid, an Opinion was filed by this Court herein and entered of record, which is in the words and figures following, to-wit:

[fol. 63] Docket No. 28309—Agenda 51—November, 1944

MAX LEVINSON, Appellant,

v.

SPECTOR MOTOR SERVICE, Appellee

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is an appeal on a certificate of importance from a judgment of the Appellate Court for the First District. Appellant, Max Levinson, brought an action in the municipal court of Chicago, against appellee, Spector Motor Service, a corporation, to recover overtime compensation and an additional equal amount of damages, pursuant to sections 7 and 16(b), of the Fair Labor Standards Act of 1938. (52 U. S. Stat. 1060; Title 29 U. S. C. A. sections 201-219.) We shall hereinafter refer to the appellant as plaintiff and to the appellee as defendant.

From October 1, 1939, to October 6, 1941, plaintiff was employed by defendant, a Missouri corporation, licensed in Illinois and engaged in interstate commerce as a motor carrier of freight. Section 7 of said act, which it is contended was violated, provides as follows: "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—(1) for a workweek longer than forty-four hours during the first year from the effective date of this section, (2) for a workweek longer than forty-two hours during the second year from such date, or (3) for a workweek longer than forty hours after the expiration of the second year from such date,—unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The aforesaid provisions of the act became effective October 24, 1938, and plaintiff claims that he worked 87

hours per week for the period from October 1, 1940, to October 6, 1941, during which time defendant violated section 7 of the act by refusing to pay him time and a half for all hours in excess of 42 hours per week during the period from October 1 to October 24, 1940, and for all hours in excess of 40 hours per week from October 25, 1940, to October 6, 1941, less one week's vacation.

Plaintiff was employed by the Spector Motor Service at its terminal located at 600 West Twenty-fifth street, in the city of Chicago, and checked, unloaded and received [fol. 64] inbound freight. The inbound receiving platform is about a half-block long, connected with the office and the trucks coming in back up against the terminal. The work of unloading is performed by gangs of three or four men together. One is a checker, one is an unloader and one is a wheeler. The checker goes into the office, asks for bills to correspond with the incoming load, and, after securing the bills from the terminal manager, his gang starts unloading freight on the terminal. The duties require the checker to check the freight, the sorter sorts it out, and the wheeler puts the freight in separate sections in the terminal and is told by the checker where to put it. The outgoing freight was operated in a similar manner but was carried on mostly in the nighttime. Plaintiff, as checker, had supervision of the others working with him, was in contact with the office, and checked payrolls, as well as shipment bills from various States named thereon against shipment freight loads, to see that they corresponded and tallied correctly.

Defendant contends that plaintiff has no right to bring any action under the Fair Labor Standards Act because the nature of his employment specifically exempts him from its provisions; that it is engaged in the business of interstate freight by motor vehicle and that it is under the specific jurisdiction of the Interstate Commerce Commission by virtue of the United States Motor Carrier Act of 1935; (49 U. S. Stat. 543; Title 49 U.S.C.A. sec. 304;) that plaintiff worked as a dockman, loader and dock foreman, and during all of said time performed no duties other than those inherent to, directly connected with and incidental to, the safety of the vehicles and the cargo carried thereby and the persons connected therewith or who might come in contact with said cargo, vehicles, or either or both of them; and that plaintiff does not come under the pro-

visions of the Fair Labor Standards Act for the reason that employment of this nature is specifically exempted thereby.

The trial court found the plaintiff worked 87 hours per week during the period for which this suit was brought and that the major portion of the work performed by him during that period did not affect the safety of defendant's operations and that plaintiff was not exempted from the provisions of the act. It is contended by defendant that this finding that the plaintiff is not exempted is erroneous as a matter of law and is against the manifest weight of the evidence. It is also contended by defendant that the amount of the judgment entered exceeded the court's juris- [fol. 65] diction in plaintiff's fourth-class action. In this respect the court found that plaintiff worked 87 hours per week from October 25, 1940 to October 6, 1941, which is 48 4/7 weeks which, under section 7(a)(3), were limited to 40 hours per week; that the salary of $150 per month divided by the number of hours worked and time and one-half for overtime, in violation of the provisions of the act, amounted to $487.44, and also found that, under the provisions of the act, plaintiff was entitled to a like sum of $487.44, as liquidated damages, and under further provisions of the act, entitled to attorney's fees in the sum of $175, and entered judgment for $1149.88, accordingly.

The Appellate Court held that plaintiff was exempted from section 7 of the Fair Labor Standards Act for the reason that some part of his workweek was devoted to the direction and supervision of the loading of interstate motor vehicle carriers and that some of his duties substantially affected the safety of operation. The correctness of the Appellate Court's holding that the true determinant is whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial, is the principal question before this court for solution. At this point it might be said that the trial court held as a matter of law, and found as a matter of fact, that the major portion of plaintiff's work did not affect the safety of defendant's operations within the meaning of section 204 of the Motor Carrier Act of 1935, and that plaintiff was not, therefore, exempted by virtue of said section 13(b), of the Fair Labor Standards Act of 1938, while the Appellate Court held that some part of plaintiff's work was devoted to the

direction and supervision of loading of interstate motor freight carriers, that there was no question that the loaders in his gang were exempted from section 7 of the Fair Labor Standards Act because of the manner in which their work affected the safety of the operation of defendant's motor vehicles and that the duties of plaintiff, who planned and directed the loading, affected that safety. The Appellate Court further held that the true determinant is whether an employee performs any duties which substantially affect the safety of operation rather than whether the duties affecting safety are substantial, and that the finding of the lower court that plaintiff is not exempted was erroneous as a matter of law.

It is urged by plaintiff that the Appellate Court's determination that an employee is exempt who performs "any" duties which substantially affect the safety of operation, [fol. 66] as distinguished from performing substantial duties affecting such safety, is not supported by any ruling or court decision and is not the law. This, of course, presents the question as to what is, as a matter of law, the correct determinant, considering the purpose of the Motor Carrier Act.

Much difficulty has been encountered by the courts and the Interstate Commerce Commission as to the construction to be given section 204 of the Motor Carrier Act of 1935. (49 U. S. Stat. 543, 49 U.S.C.A. par. 304.) That section empowers the commission to regulate the qualifications and hours of service of employees whose activities affect the safety of operation. (*United States* v. *American Trucking Ass'n*, 310 U. S. 534-553, 60 S. Ct. 1059-1067, 84 L. ed. 1055.) Section 13(b) of the Fair Labor Standards Act provides, "The provisions of section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or (2) any employee of an employer subject to the provisions of sections 1-27 of Title 49." It can thus be seen that section 13(b) exempts from the provisions of section 7, any employee subject to the jurisdiction of the Interstate Commerce Commission under section 204 of the Motor Carrier Act.

In Ex Parte No. MC-2, 28 M.C.C. 125, the commission interpreted the term "safety of operation," used in

that case, to include employees who devote a substantial part of their time to activities which directly affect safety of operation. At page 131, the commission stated, "We therefore conclude that under said section 204(a) we have power to establish qualifications and maximum hours of service with respect only to employees who devote a substantial part of their time to activities which directly affect safety of operation. Our task is thus narrowed to determining which employees of common and contract carriers and of private carriers of property by motor vehicle, engaged in interstate or foreign commerce, fall within that category." It was held in the *American Trucking Ass'n case* that the commission and the wage and hour division have both interpreted section 204(a) as relating solely to safety of operation and that such interpretations are entitled to great weight. The court in that case, after referring to section 204(a) of the Motor Carrier Act and section 13(b) of the Fair Labor Standards Act which provided, "The [fol. 67] provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204, (Title 49, par. 304,) of the Motor Carrier Act of 1935," said: "This exemption brought sharply into focus the coverage of employees by Motor Carrier Act, Section 204(a). Clerical, storage and other nontransportation workers are under this or the Fair Labor Standards Act, dependent upon the sweep of the word employee in this act. The Commission again examined the question of its jurisdiction and in Ex Parte No. MC-28 again reached the conclusion that its power under 'section 204 (a)(1) and (2) is limited to prescribing qualifications and maximum hours of service for those employees . . . whose activities affect the safety of operation.' It added: 'The provisions of section 202 evince a clear intent of Congress to limit our jurisdiction to regulating the motor-carrier industry as a part of the transportation system of the nation.'"

We have analyzed the cases as to the interpretation and construction to be given the Motor Carrier Act as to employees coming thereunder by reason of their employment affecting safety operations and are of the opinion that the true determinant is not whether an employee performs any duties which substantially affect the safety of

operations, but whether the duties affecting the safety are substantial. This brings us to the question of the effect of the Appellate Court's decision.

Plaintiff's contention is that the Appellate Court erred in disregarding the specific findings of the trial court that the major portion of plaintiff's duties did not affect safety of operation; that the findings of the court cannot be disregarded or disturbed unless against the manifest weight of the evidence; that where the evidence is merely conflicting the Appellate tribunal should not substitute its judgment as to the credibility of witnesses for that of the jury or the trial court. Plaintiff, therefore, insists that this court reverse the judgment of the Appellate Court and affirm the findings and judgment of the trial court. We do not think the Appellate Court substituted its judgment, as to the credibility of witnesses, but only exercised its authority under section 89 of the Civil Practice Act, to make a final determination of the case different from that of the trial court. (Ill. Rev. Stat. 1943, chap. 110, par. [fol. 68] 213.) In nonjury cases, such as this, the Appellate Court may make findings of fact different from the findings of the trial court. In the case of *Ebbert* v. *Metropolitan Life Ins. Co.* 369 Ill. 306, this court, at page 310, said: "It is appellant's contention that, since the evidence was conflicting, it was the province of the trial judge to weigh the evidence, and that, by invading that province and reversing the judgment, the Appellate Court committed an error of law. However, this contention cannot be sustained in view of the contrary language of section 89 of the Civil Practice act. (Ill. Rev. Stat. 1937, chap. 110, par. 213.)". Plaintiff's contention that this court should affirm the findings and judgment of the trial court in that respect is not tenable.

Defendant contends the Appellate Court has exercised its statutory authority making final decision of the case and that the decision of the Appellate Court should therefore be affirmed. This presents the question as to whether or not the facts found by the Appellate Court sufficiently appear in the opinion or in the final judgment, or, from an examination of the two, to support the judgment as entered. We think the question of fact to be properly determined in this case is whether or not a substantial part of plaintiff's work affects safety of operation of motor vehicles, and that this question of fact controls this case.

If it be determined from the evidentiary facts that plaintiff, in a substantial part of his work, was engaged in safety of operation of motor vehicles, or the cargo thereof, he would be exempted from the Fair Labor Standards Act, as a matter of law.

The Appellate Court found that the loaders in Appellant's gang were exempted from section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading effecting the safety of operation.

The substantial effect of the comment of the Appellate Court was to effect that the quantity of plaintiff's activity was not the true test of exemption from the Fair Labor Standards Act, yet said court did hold the appellant was in the same position as the loaders.

The Appellate Court may be in error in the reasons given for its judgment, but, under the facts as found by the court, the employee came within the same exemption as loaders, dockmen and helpers.

For the reason aforesaid, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

[fol. 69] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 8th day of January in the year of our Lord, one thousand nine hundred and forty-five, within and for the State of Illinois.

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal.

Attest: Earle Benjamin Searey, Clerk.

Be it Remembered, that, to-wit: on the 17th day of January, 1945, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 28309

MAX LEVINSON, Employee, Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corporation, Appellee

Appeal from Appellate Court, First District

4161115, 42651

Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Appellate Court for the First District aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant Costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 14th day of June, 1945.

Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois.

[fol. 70] And afterwards, to-wit, on the 12th day of February, 1945, the same being in vacation after the term of Court aforesaid, there was filed by Appellant herein a Petition for Rehearing, which is in the words and figures following, to-wit:

[fol. 72] IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING—Filed February 12, 1945

Now comes Max Levinson, plaintiff-appellant, by Yale & Yale, his attorneys, and presents his petition for rehearing of the above entitled cause and respectfully prays that a rehearing be granted in said cause upon the grounds and for the reasons hereinafter set forth in the petition herewith presented.

Yale & Yale, Attorneys for Plaintiff-Appellant.

[fol. 73] May it please the Court:

This Court's opinion states that plaintiff checked, *unloaded* and received inbound freight. The statement that the plaintiff "unloaded" freight is erroneous. This Court overlooked the fact that the uncontradicted testimony in the record is that plaintiff never unloaded or loaded freight (Abst. 13-14). The record shows that plaintiff never so much as "carried a package." As this is an element to be considered in deciding this case, this Court overlooked the fact that the Interstate Commerce Commission defined a loader as exempted from the Fair Labor Standards Act only when, as a loader, he devotes a *substantial* part of his time to activities which *directly* affect safety of operation (App. br. 15). No witness testified in this case that the duties of plaintiff were those of a loader, dockman or helper.

This Court enumerated the many duties of plaintiff but still overlooked and misapprehended a great number of other duties he performed not connected with safety of operation, all of which are more fully set forth in abstract pages 8 to 18 and 29 to 31, inclusive. It is important that this be considered because it shows that the trial Court was amply justified in finding that the major part of plaintiff's duties did not affect safety of operation.

As to defendant's defense, outlined in the opinion, this Court overlooked and misapprehended that the matters set forth constitute no defense. Defendant's allegation that plaintiff is specifically exempt from provisions of the Fair Labor Standards Act is general. The allegation that the Interstate Commerce Commission has jurisdiction of plaintiff is of no consequence without alleging how it has

acquired such jurisdiction, and linking it to a proper defense. The allegation that plaintiff worked as a dockman, [fol. 74] loader and dock foreman is insufficient unless in the language of the Interstate Commerce Commission, it is also alleged and proven that such were his duties and that he was a loader, dockman or dock foreman who devoted a *substantial* part of his time to activities *directly* affecting safety of operation; that the allegations, referring to the safety of vehicles and "the cargo carried thereby" and the persons connected therewith, are immaterial because the Commission and the decisions of the courts hold that the matter of safety is confined to the *vehicles* only, not to cargo as cargo or to persons as persons. *Anuchick* v. *Trans. Freight Co.*, 6 Labor Cases, 61, 245.

This Court further overlooked and misapprehended the significance of the Appellate Court's statement that *some* part of plaintiff's work was devoted to the direction and supervision of loading. This is simply a statement gleaned from the record. If it is remembered that the trial Court found that the major portion of plaintiff's duties did not affect safety of operation, it necessarily follows that some part of plaintiff's duties affected such safety; otherwise, the trial Court would have found that *all* of plaintiff's duties did not affect such safety. It is thus clear that the Appellate Court merely made a statement based on an inference, and such statement is unlike and contrary to the character and nature of making a finding of fact different than the finding made by the trial Court.

The point of greatest importance, however, is that the Appellate Court did not find or hold that plaintiff did a *substantial* part of work in safety of operation rather than *some* part. Had this been done, it would show an intention to make a finding different than the trial Court, which found that the major portion of plaintiff's work did not affect such safety. The Appellate Court did not so hold but used the word "some" for its basis in stating that plaintiff did work affecting such safety. Therefore, the [fol. 75] Appellate Court held that if "*any*" of plaintiff's work affected such safety, he is exempt from the Act.

This Court overlooked and misapprehended that the Appellate Court assumed a fact which is not borne out by the record, and was not in issue or decided. That assumed fact is that there was no question that the loaders in plaintiff's gang were exempted from Section 7 of the Labor Act

because of the manner in which their work affected safety of operation. The record in this case nowhere shows any finding, issue, evidence or stipulation to the effect that the loaders in plaintiff's gang were exempt. The loaders were not involved here, and any finding as to loaders is extraneous and is based purely on conjecture and not on any matters in issue. This Court erroneously considered this assumption as if it were a fact found in a judicial inquiry. It then based its own decision on such assumption, and overlooked the fact that the Appellate Court's decision itself negatives the Supreme Court's impression that the Appellate Court made any findings, or was guided by findings, in its decision because it expressly states the following:

> "It is our conclusion that the finding that plaintiff is not exempted is erroneous *as a matter of law*, and the judgment based thereon be and it is hereby reversed." (Italics ours.)

Furthermore, even if the Appellate Court assumed that plaintiff's services were of the same class as loaders, it made no finding whatsoever as to whether these services were a *substantial* part of plaintiff's duties. This was essential because this Court adopted a different determinant than the Appellate Court and plaintiff's duties were admitted to be diversified and fluctuating.

This Court overlooked and misapprehended the significance of its holding that the true determinant is *not* whether an employee performs *any* duties which substantially affect [fol. 76] safety of operation but whether the duties affecting safety are substantial. This interpretation was urged by plaintiff-appellant. It was contended by him here that the Appellate Court erred in holding that the true determinant is whether "*any*" duties were performed by plaintiff in safety. It is evident that this is the crux of the case and is the only point here involved. It is clear that after this Court adopted its liberal construction, which is in accord with all past decisions, then there was nothing further to do but to reverse the Appellate Court for reversing the trial Court upon an erroneous determinant. The determinant adopted by this Court is the opposite of the Appellate Court's test. It is decisive of the issues in this case because the trial Court found that the *major* portion of plaintiff's work-week did not affect safety of opera-

tion. Taking away the major portion from the whole, nothing but a minor or unsubstantial portion remains. Therefore, according to the opinion of this Court, an unsubstantial portion of duties performed in safety should not exempt an employee from the overtime provisions of the Act.

This Court refers in its opinion to the U. S. Supreme Court's holding that the interpretations of the Interstate Commerce Commission and the Wage and Hour Division are "entitled to great weight." However, it misapprehends that affirming the Appellate Court's decision is in direct conflict with, and contrary to, their interpretations.

Interpretive Bulletin No. 9 of the Wage and Hour Division (Fifth Revision October 1943) states that if the greater part of an employee's duties do not affect safety of operation, such employee was not within the scope of the exemption contained in Section 13 (b) (1). The Bulletin states:

> "It should be noted that any truck driver, drivers' helper, mechanic or loader employed by a common, [fol. 77] contract or private carrier, who spends the greater part of his time during any workweek on non-exempt activities (such as producing, processing or manufacturing goods, warehouse or clerical work, or other type of work which does not affect safety of operations) is not within the scope of the exemption contained in section 13 (b) (1). It is the opinion of the Division that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time in work other than that which forms the basis of the exemption. . . .
>
> "See *Anuchick et al.* v. *Transamerican Freight Lines*, 8 Labor Cases, 61,245; *Hutchinson* v. *Barry* (U. S. D. C. Mass.) 3 Federal Carrier cases, par. 80,095 (6 Wage Hour Report, 616) *cf. Knight, i.c.* v. *Mahtel*, 6 Wage Hour Rept. 466"

Moreover, this Court overlooks the fact that plaintiff spent *some* time only in duties affecting safety and yet deprives him of the benefits of the Act. There is no adjudication or evidence in the record that plaintiff's duties in safety of operation were *substantial*, but there is evidence, and a finding based on such evidence, that the

greater portion of plaintiff's duties did not affect safety of operation, from which it can be inferred that the duties affecting safety were in fact not substantial. It is thus clear that the determinant or test adhered to by this Court has not been followed in arriving at its decision. This Court, in effect, based its decision upon the same theory as the Appellate Court, but instead of employing the determinant of "*any*" duties, this Court, in effect, substituted "*some*" duties in affirming the Appellate Court.

The trial Court's finding that the *major* portion of plaintiff's duties were not performed in safety of operation means that the converse must be true, that only a small or minor portion of time was left for him to devote to [R. 78] safety of operation. The Appellate Court, in another case, defined the meaning of the word "major" as follows:

> "The word, 'major,' as used in Bulk Sales Act, which requires compliance with the Act in the case of a sale of a major part of a seller's business, must be construed in its ordinary meaning and, as so construed, means greater or larger." *Zenith Radio Distributing Corp.* v. *Mateer*, 311 Ill. App. 263.

Webster's New International Unabridged Dictionary defines "major" as greater in number, quantity or extent; as, the major part of the assembly; the major part of revenue.

This Court misapprehended the application of Section 89 of the Civil Practice Act for the reason that said section only applies where it *sufficiently* appears from the opinion of the Appellate Court, or the finding or judgment, or from an examination of the two, that certain findings were made. This is a provision designed to prevent reversals on technical ground that the facts found, although stated in the opinion, are not recited in the final order. However, this section is not designed to make findings not supported by the record in the case. (*Darmody* v. *Kroger Grocery & Baking Co.* 362 Ill. 554.) Nor is it designed to serve as a means to search the opinion for such material as can be said to amount to a finding. The plain language of the section is that the findings must *sufficiently* appear; although not in the judgment order itself. In this case it does not sufficiently appear from the Appellate

Court's opinion that the reversal of the trial Court is based on findings of fact. It is there stated expressly that the judgment is erroneous *as a matter of law* and was reversed for that reason.

The only reason which this Court gives for stating that this case was decided by the Appellate Court on a question [fol. 79] of fact is what this Court calls a "comment" of the Appellate Court and which this Court seems to conclude to be a finding to the effect that, if the loaders in appellant's gang were exempted from Section 7 of the Act, then appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation. The Supreme Court overlooks and misapprehends the significance of this "comment" and erroneously considers it a finding of fact. There is no evidence or finding in the record that the loaders in plaintiff's gang were exempt, or that they devoted a *substantial* part of their time to activities which directly affected safety of operation. It is evident that the Appellate Court did not intend this as a finding that plaintiff devoted a *substantial* part of his work-week to duties directly affecting safety of vehicle operation, but simply used it to formulate its determinant. That Court reasoned that since plaintiff did *some* amount of work in safety of operation, then *any* amount of such work exempts him from the benefits of the Act.

This Court overlooked and misapprehended the fact that, even if plaintiff did perform some work in safety of operation, it was only an unsubstantial part of his work-week and could not amount to a substantial part. This is borne out by the evidence that plaintiff's duties were fluctuating and diversified, all of which had to do with the orderly and efficient operation of the terminal and had no relation to safety of operation of the vehicles as such while traveling along the highway. It was not denied by defendant that plaintiff was employed as a checker and performed other duties. This Court overlooked the cases cited in appellant's brief to show that recovery was allowed in similar cases, and cited no authority to support its position that if some duties performed by an employee are substantial, then he [fol. 80] is exempt without a proper adjudication of the term "substantial" as interpreted by the Commission, the Wage and Hour Division and the Courts. It appears, therefore, that plaintiff-appellant was deprived without

due process of law of the benefits of a judgment entered by a competent court of record.

This Court overlooked and misapprehended that the Commission itself refused to assert jurisdiction over all terminal or freight employees. It enumerated four definite classes of employees and refused to include checkers such as plaintiff, and even refused to assert jurisdiction over drivers or dock foremen unless it could be shown that they spent a *substantial* part of their work-week in work *directly* affecting safety of operation. This Court also misapprehended that the Fair Labor Standards Act must be liberally construed or its purpose would not be promoted thereby; that it must be *assumed* that all employees in interstate commerce, as far as reasonably possible, should be made subject to the provisions of the Act and not excluded therefrom; that exemptions would tend to defeat the purpose of the Act and should be strictly construed.

Conclusion

In view of the fact that this Court has overlooked the matters hereinabove pointed out, we respectfully urge that a rehearing be granted, and that on such rehearing the judgment of the Appellate Court should be reversed and the judgment of the trial Court should be affirmed.

Respectfully submitted, Yale & Yale, Attorneys for Plaintiff-Appellant.

[fol. 81] UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 12th day of March in the year of our Lord, one thousand nine hundred and forty-five, within and for the State of Illinois:

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal.

Attest: Earl Benjamin Searcy, Clerk.

And afterwards, to-wit, on the 19th day of March, 1945, being one of the days of the term of Court aforesaid, the Court having considered the Petition for Rehearing filed by Appellant herein, and being fully advised in the premises, Doth Deny said Petition for Rehearing.

[fol. 82] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 14th day of May in the year of our Lord, one thousand nine hundred and forty-five, within and for the State of Illinois.

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal.

Attest: Earle Benjamin Searcy, Clerk.

And afterwards, to-wit, on the 14th day of June, 1945, the same being in vacation after the term of court aforesaid, a

Praecipe for Record was filed by Appellant herein, which is in the words and figures following, to-wit:

[fol. 83] IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM A. D., 1944

No. 28309

MAX LEVINSON, Employee, Plaintiff-Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corp., Defendant-Appellee

Appeal from the Appellate Court of Illinois, First District, on Certificate of Importance

Tried heard on appeal from Municipal Court of Chicago. Honorable Wendell E. Green, Judge Presiding.

PRAECIPE FOR RECORD

To the Honorable Earle Benjamin Searcy, Clerk of the Supreme Court of Illinois:

Please prepare for transmission to the Clerk of the Supreme Court of the United States a certified transcript of record of the proceedings had and documents filed in the above entitled cause in the Supreme Court of Illinois, as follows:

1. Placita.

2. Copy of Printed Abstract and Additional Abstract of transcript of record of the Municipal Court of Chicago, Illinois, on appeal of the above entitled cause to the Supreme Court of Illinois.

3. Copy of the complete transcript of record of proceedings had in the above captioned cause in the Supreme Court of Illinois, including motion of Metcalf Walling, Administrator of the Wage & Hour Division, United States Department of Labor, for leave to file Brief as Amicus Curiae and suggestions filed by him in support of his motion.

4. Copy of printed petition for rehearing filed pursuant to Rule 44 of the Illinois Supreme Court.

5. Copy of this praecipe for record and proof of service thereof.

6. Certificate of the Illinois Supreme Court Clerk, certifying that the foregoing is a true and correct copy of the proceedings had and documents filed in this cause in the Supreme Court of Illinois as specified in the foregoing Praecipe for Record.

[fol. 84] Max Levinson, Plaintiff-Appellant, by Harry L. Yale, His Attorneys.

Received a copy of the foregoing Praecipe for Record this 13 day of June A. D., 1945.

Golden & Golden, Attorneys for Spector Motor Service, a Corp., Defendant-Appellee.

[fol. 85] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois, and keeper of the records and Seal thereof, do hereby certify the foregoing to be a true copy of

1. Placita showing that Record of the Municipal Court of Chicago was filed on September 2, 1944.
2. Abstract of Record filed by Appellant on September 2, 1944.
3. Additional Abstract of Record filed by Appellee on September 30, 1944.
4. Motion by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, and Suggestions in support of said Motion, filed on October 28, 1944.
5. Order of Court denying said Motion, entered on November 14, 1944.
6. Order of Submission entered on November 27, 1944.
7. Opinion of the Supreme Court of Illinois filed on January 17, 1945.
8. Mandate.
9. Petition for Rehearing filed by Appellant on February 12, 1945.
10. Order entered on March 19, 1945, denying Petition for Rehearing.
11. Praecipe for Record filed by Appellant on June 14, 1945.

filed in this office in a certain cause entitled in this Court

No. 28309

MAX LEVINSON, Employee, Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corporation, Appellee

Appeal from Appellate Court, First District

41611-15. 42651

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 14th day of June 1945. Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois. (Seal.)

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of Certiorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

[Endorsed on Cover:] Enter Richard S. Folsom. File No. 48,842, Illinois, Supreme Court, Term No. 139. Max Levinson, Petitioner, vs. Spector Motor Service, a corporation. Petition for a writ of certiorari and exhibit thereto. Filed June 19, 1945. Term No. 139 O. T. 1945.

Office - Supreme Court, U. S.
FILED
JUN 19 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 22

MAX LEVINSON,
Plaintiff-Petitioner

vs.

SPECTOR MOTOR SERVICE, a corp.,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI

RICHARD S. FOLSOM,
HARRY L. YALE,
228 N. La Salle Street,
Chicago, Illinois,
Attorneys for Max Levinson,
Plaintiff-Petitioner.

BARNARD & MILLER, 33 S. Market St., Chicago. FRanklin 0662

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No.

MAX LEVINSON,

Plaintiff-Petitioner,

vs.

SPECTOR MOTOR SERVICE, a corp.,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable

The Supreme Court of the United States:

Max Levinson, petitioner, respectfully prays that a writ of certiorari issue to the Supreme Court of Illinois, directing that Court to certify to the United States Supreme Court the record in the case of *Max Levinson* v. *Spector Motor Service, Inc.*, case No. 28309, in order that the decision and judgment of said Court rendered March 19, 1945, may be reviewed by this Court and, for sufficient grounds, reverse that Court's decision and judgment.

SUMMARY STATEMENT OF MATTERS INVOLVED.

On April 16, 1943, petitioner filed suit in the Municipal Court of Chicago, Illinois, against respondent Spector Motor Service, Inc. He sued under the Fair Labor Standards Act and alleged that respondent was a motor carrier in interstate commerce; that from October 1, 1939 to September 30, 1940, he was employed as a laborer, for which period no claim was made; that from October 1, 1940 and up to and including October 6, 1941, he was employed on a different basis at a salary of $150.00 per month, not as a laborer but to perform divers duties; that he worked 87 hours per week and was refused overtime pay. (Tr. 7-9.)

Respondent filed a defense denying petitioner's allegations, but admitting his new basis of employment and performance of the different duties described in the complaint except denying that petitioner checked payrolls. Respondent averred that petitioner was a dockhand, and that all his duties were the usual work of such a dockhand, and specifically exempt from the Fair Labor Standards Act.

Respondent later filed an amended defense, averring that the activities of respondent and its employees are under the specific jurisdiction of the Interstate Commerce Commission by reason of the U. S. Motor Carriers Act of 1935; that petitioner actually worked as a dockman, loader and dock foreman, and his duties were directly connected with the safety of vehicles. (Tr. 10 and 44.)

Trial was had before that Court without a jury. The evidence introduced showed that petitioner's status of employment was changed to that of a checker and he performed other diverse, fluctuating duties (Tr. 16); that in the performance of these duties he worked 87 hours per

week (Tr. 22); that the major or greater portion of the work done by petitioner did not directly affect safety of operation of motor vehicles.

Special findings of fact were entered by that Court. One of the findings were to the effect that the major portion of petitioner's duties did not affect safety of operation. Judgment was rendered against respondent in the sum of $1,149.88 and court costs, including liquidated damages and attorney's fees. (Tr. 11-13.)

Respondent appealed to the Appellate Court of Illinois. That Court reversed the judgment of the trial Court on the theory that, as a matter of law, if petitioner "performed any" work affecting safety of operation it is sufficient to deprive him of coverage under the Fair Labor Standards Act. (Appellate Court opinion appended.)

Petition for rehearing was filed and was denied, but the Appellate Court did at the same time grant a certificate of importance.

Appeal was then filed in the Illinois Supreme Court. In due time, L. Metcalf Walling, Administrator of the Wage and Hour Division of the Department of Labor, moved for leave to file a brief as *amicus curiae*. (Tr. 56-58.) In his suggestions in support of the motion, he stated that his interest is that of the public expressed in remedial statute of great importance designed to eliminate substandard labor conditions; that the responsibility of administering the Act is placed upon him; that he has a real and substantial concern in the interpretations and rulings that may be made in employee suits and the effect they may have on the administration of the Act; that this appeal involves the interpretations of Sections 204(a)(1) and (2) of the Motor Carrier Act and Section 13(b)(1) of the Fair Labor Standards Act; that the decision will affect

thousands of employees of motor carriers throughout Illinois and the United States; that his brief will concern the issue whether a "motor carrier employee who performs any duties" in safety of operation of motor vehicles is exempt from the overtime provision; that this is of first impression in Illinois, and that this point had not been decided by the United States or any United States Court of Appeals. The Court, however, denied the motion of L. Metcalf Walling and affirmed the Appellate Court decision.

Petitioner filed in due time a petition for rehearing, which the Supreme Court denied on March 19, 1945. (Tr. 71.)

Thus the petitioner was deprived of the judgment without due process of law and in violation of Section 1, Amendment XIV, U. S. Constitution.

BASIS UPON WHICH IT IS CONTENDED THAT THE UNITED STATES SUPREME COURT HAS JURISDICTION.

Petitioner's claim was predicated on Section 7 of the extremely important Fair Labor Standards Act, the purpose of which was to eliminate sub-standard living.

Section 13(b)(1) of the Fair Labor Standards Act (Section 213(b)(1), Title 29, U.S.C.A.) provides that the provisions of Section 7 of the Act dealing with maximum hours, and overtime compensation, under which this action was brought:

> "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935; * * *."

Because of the defense interposed by respondent, the U. S. Motor Carrier Act was drawn in, the pertinent part of which is:

> "It shall be the duty of the Commission—(1) To

> regulate common carriers by motor vehicles as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Trial was had without a jury in the Municipal Court of Chicago and judgment was rendered for petitioner based on specific findings of fact, among which was a finding that petitioner worked 87 hours per workweek and that the *major* portion of petitioner's duties by him performed did not affect safety of operation.

Respondent appealed to the Appellate Court of Illinois. It then became necessary for that court to give utmost consideration to the interpretation of the Labor Act and its applicability to the case at bar in the manner intended by the Act and as interpreted by the Federal District Courts and the United States Supreme Court. It was necessary to take into account and follow the interpretations of the Administrator of the Labor Act and also to place a proper construction on Section 204(a)(1) and (2) of the Motor Carrier Act of 1935 and to follow the decisions and interpretations of the Interstate Commerce Commission.

But the Appellate Court disregarded the foregoing and reversed the judgment on federal grounds as clearly shown by its opinion stating as follows:

> "There is no question that some part of plaintiff's work-week was devoted to the direction and supervision of the loading of interstate motor freight carriers. There is no question either that the loaders of his gang were exempt from Section 7 of the Fair Labor Standards Act. We think, therefore, that with greater force plaintiff comes within the exemption for, if the loaders are exempt because the manner in which

that work affects the safety of the operation of defendant's motor vehicles, certainly the duties of plaintiff who planned and directed the loading affected that safety. Considering the purpose of the Motor Carrier Act, we believe that the true determinant is whether an employee performs any duties which substantially affect the safety of operation rather than whether the duties affecting safety are substantial.

We need consider no other point.

It is our conclusion that the finding that plaintiff is not exempted is erroneous as a matter of law, and the judgment based thereon should be, and is, hereby reversed. * * *"

The Appellate Court was without authority in holding that the loaders of plaintiff's gang were exempt from Section 7 and that, therefore, with greater force he came within the exemption, because there was no issue, evidence, stipulation or finding in the record that the loaders were exempt. It thus follows that the Court's conclusion was wrong because it was based on a false premise.

In holding that the test of applicability of exemption is whether an employee performs "*any*" duties rather than whether such duties are *substantial* shows that the Court evolved a new theory of law diametrically opposed to the accepted Federal provisions, decisions and interpretations. The Court thus thwarted and distorted the Labor Act to such a peculiar extent that, if allowed to become the law, all employees in the freight industry similarly situated are at once deprived of the Labor Act coverage because they may have occasionally carried a package, or changed a label, or checked the damage to some parcel.

Petition for rehearing was filed and denied, but that Court granted a certificate of importance for appeal to the Supreme Court of Illinois.

Petitioner accordingly appealed to the Supreme Court,

and that Court affirmed the decision of the Appellate Court on federal grounds. The opinion of the Supreme Court appears at page 63 of the transcript and is reported in 389 Ill. 466. The finding of fact of the trial Court that the major part of petitioner's duties did not affect safety of operation was not disturbed by the Appellate Court nor by the Supreme Court.

The determinant formulated by the Appellate Court was the only basis for the reversal of the trial court judgment. The Supreme Court admitted this to be erroneous. Inasmuch as this was the only theory upon which that decision was founded, it was the plain duty of the Supreme Court to reverse the Appellate Court and affirm the trial court judgment.

The Supreme Court's decision states as follows (Tr. 68):

> "The Appellate Court found that the loaders in appellant's gang were exempted from Section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation.
>
> "The substantial effect of the comment of the Appellate Court was to the effect that the quantity of petitioner's activities was not the true test of exemption from the Fair Labor Standards Act, yet said Court did hold appellant was in the same position as loader."

From the above it is evident that the Supreme Court based its decision on a supposition of the Appellate Court, which is designated by the Supreme Court itself as a *comment*. This supposition, as stated before, has no basis whatsoever in the record. Moreover, from the above quotation it also appears that the Supreme Court's inference that the substantial effect of the comment of the Appellate

Court was that the quantity of petitioner's activities was not the true test of the exemption. This is clearly a misconception. The Appellate Court decision is plain and leaves no room for inferences. It is limited and narrowed to their formula by their express words. They state in the decision: "We need consider no other point." The test or determinant formulated in said decision is that one who performs *any* duties in safety of operation is exempt from the benefits of the Labor Act. It is clear that both the Appellate and the Supreme Court decisions are founded on a misinterpretation of the Labor Act, as well as the Motor Carrier Act.

Furthermore, the Interstate Commerce Commission is vested by law with sole power to decide and rule with respect to employees over whom it asserts jurisdiction. Repeated demands have been made on that Commission to extend its jurisdiction over all motor carrier employees and it consistently refused to do so. On the above decisions no claim of a freight industry employee can sustain a right to Labor Act coverage, thus the decision is in fact legislative and invades the province of the Commission's jurisdiction by inclusion of types of employees whom they consistently excluded.

In *Illinois Steel Co.* v. *B. & O. R. R. Co.*, 320 U. S. 50, the basis of the suit was to recover freight charges, and involved clauses of the Uniform Bill of Lading adopted by the Interstate Commerce Commission and prescribed by Congress for interstate shipments. This Court held that the case presents a Federal question, the determination of which by a State Court is subject to its review, and a writ of certiorari was granted on the ground that interpretation of that Act under the circumstances of the case is a question of public importance.

In *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, this Court ruled similarly on a petition for a writ of certiorari in an action under the Federal Employers' Liability Act.

In *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328, the writ issued to reverse an erroneous state court decision which was based upon misapplication of the Bankruptcy Act.

In *McCullough* v. *Smith*, 293 U. S. 228, the writ was granted to reverse an erroneous decision misapplying the World War Veterans' Act.

In *Atlantic Coast Line R. Co.* v. *Temple*, 285 U. S. 143, the writ was granted where the state court, although purporting to apply the statutory tests of liability under the Federal Employers' Liability Act as established in prior Supreme Court decisions, has in fact permitted recovery upon proof insufficient to sustain a finding of negligence.

Sovereign Ry. Co. v. *Moore*, 284 U. S. 581, has in fact ignored or misapplied the statutory rule relating to assumption of risk.

Atchison T. & S. F. Ry. Co. v. *Saxon*, 284 U. S. 458, has sustained a recovery without proof that the alleged negligence was the proximate cause of the injury.

In *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, its judgment fails to give effect to the established rules relating to injuries resulting from disobedience of rules or orders.

To the same effect are the cases in *St. Louis S. W. Ry. Co.* v. *Simpson*, 286 U. S. 346; *Southern Ry. Co.* v. *Youngblood*, 286 U. S. 313—and *Same* v. *Dantzler*, 286 U. S. 318.

In *Denton* v. *Yazoo and M. V. R. Co.*, 284 U. S. 285, the

writ issued to inquire whether the state court had rightly applied the regulations and the rules of the law of master and servant in determining whether a negligent worker was the servant of the U. S. or of a railroad company at the time of the injury.

In *St. Louis I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 293, a refusal by a state court to give a federal statute or treaty the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right or immunity under the laws of the U. S.

Hopkins Fed. Sav. & Loan Assn. v. *Cleary*, 296 U. S. 315, 332.

State court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

QUESTIONS PRESENTED.

Did the Supreme Court of Illinois adhere to the Labor Act Administrator's interpretation that the power exists in the Interstate Commerce Commission to fix the maximum hours of work of drivers, helpers, mechanics and loaders, and such employees are presently exempt under Section 13(b)(1) and that all other classes of common, contract and private motor carriers are clearly not within the exemption contained in Section 13(b)(1)?

Did the Supreme Court of Illinois adhere to the interpretation of the Labor Act Administrator that even as to truck drivers, helpers, mechanics or loaders employed by a common carrier WHO SPEND THE GREATER PART OF THEIR TIME DURING ANY WORK-WEEK ON NON-EXEMPT ACTIVITIES, SUCH AS

PRODUCING, PROCESSING OR MANUFACTURING GOODS, WAREHOUSE OR CLERICAL WORK, OR OTHER TYPES OF WORK WHICH DO NOT AFFECT SAFETY OF OPERATION, such employees are not within the scope of the exemption contained in Section 13(b)(1)?

Did the Supreme Court of Illinois misapprehend and disregard the fact that the Interstate Commerce Commission is vested with sole power to limit jurisdiction and it did so limit its jurisdiction to cover four classes of employees, viz., mechanics and other garage workers, loaders, drivers and driver's helpers and that therefore, it had no power to go behind that decision and broaden the coverage of the Commission's jurisdiction?

Did the Supreme Court of Illinois follow the decisions of this Court and Federal District Courts that even as to the aforesaid exempt classes of employees the further qualification must appear that the greater part of their duties *DIRECTLY* affect safety of operation, otherwise they may still be entitled to the benefits of the Labor Act?

Did the Supreme Court of Illinois misapprehend and disregard the fact that petitioner was a checker and performed other non-exempt duties and was not in any of the classes of employees over whom the Commission asserted jurisdiction, and did that Court disregard the special finding of the trial Court that the major part of his work did not affect safety of operation of motor vehicles?

Did the Supreme Court of Illinois err in denying the motion of the Labor Administrator to intervene in this cause as *amicus curiae* and in excluding the material matters he attempted to present to support the judgment of the trial Court?

Did the Appellate and Supreme Courts of Illinois correctly assume that petitioner was in the position of a leader, even though the evidence on both sides agreed that he was a checker and performed other diverse duties, and did the aforesaid Courts, based on that assumption alone, correctly apply the appropriate Federal decisions and pertinent interpretations?

Did the Supreme Court have any right to affirm the Appellate Court decision after stating that that Court was in error as to the test or determinant used to reverse the trial court judgment simply by drawing inferences from the Appellate Court comment when said Appellate Court limited and narrowed its decision by expressly stating: "we need consider no other point"?

REASONS FOR ALLOWANCE OF WRIT.

The writ should be allowed because petitioner's claim was based on a Federal Statute of far reaching importance in the economy of the States and of the nation as a whole. It vested petitioner with substantive rights and benefits, which State courts cannot impair. But the Supreme Court of Illinois did impair those rights, contrary to the Labor Act, intentions of Congress, interpretations of the Labor Administrator and decisions of the District and United States Supreme Courts.

The trial Court found in the instant case, as a matter of fact, that plaintiff worked 87 hours during each week and was not paid for overtime in violation of Section 7(a). Most important of all, the trial Court found specifically that the major portion of petitioner's work did not affect safety of defendant's operation within the meaning of Section 13(b) of the Labor Act, and was not exempt under said Section. Judgment was rendered accordingly

for petitioner, and it became his property; he had a right to the enjoyment of its benefits, and he should not have been deprived thereof.

In contesting respondent's appeal to the Appellate Court of Illinois, petitioner contended that he was employed as a checker and performed other duties; that the *major* part of his duties did not affect safety of operation and was not exempt. He cited numerous cases to support this contention: *McKeown* v. *Southern California Freight Forwarders*, 6 Labor Cases, 61,521, which involved a checker of freight and also frequently assisted in loading and unloading. This case is in all respects similar to the instant case because petitioner, too, was a checker and performed other duties; *Overnight Motor Transportation Co. Inc.* v. *Missel*, 316 U. S. 572, wherein plaintiff was a rate clerk performing other fluctuating duties and this Court accorded him the benefits of the Act; *Anuchick* v. *Transportation Freight Co.*, 6 Labor Cases, 61,245, wherein plaintiffs were mechanics who, as a class, were specifically under the jurisdiction of the Interstate Commerce Commission, yet, on their showing that a *substantial* part of their duties were performed in *non-exempt* work, they were allowed to recover. It was there stated:

> *"Technically there isn't any employee of a transportation company that isn't indirectly doing work affecting safety of operation but we believe the Interstate Commerce Commission had a definite thought in mind in rendering its decision.*
>
> "In our interpretation of the theory and reasoning of the Interstate Commerce Commission as set forth in its decision of March 1941 and in fact if there is to be a division in category of defendant's employees—it is evident that all plaintiffs here (2830) are concerned with the safety and size of car and that any activity affecting 'safety of operation' is

incidental. We therefore hold that these plaintiffs are not subject to the rules and regulations of the Interstate Commerce Commission affecting their qualifications and maximum hours of service. Such we believe to be the interpretation of their own powers by the men who know." (Emphasis ours.)

Petitioner also urged that the Statute charged the Administrator with applying the Act, and that the United States and Federal District Courts regard his interpretations of its provisions with great weight. The following portion from his Interpretive Bulletin No. 9 was cited:

"It should be noted that any truck driver, drivers' helpers, mechanic or loader employed by a common, contract or private carrier, who spends the greater part of his time during any workweek on non-exempt activities, such as producing, processing or manufacturing goods, *warehouse or clerical work, or other type of work which does not affect safety of operations* is not within the scope of the exemption contained in Sec. 13(b)(1). It is the opinion of the Division that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time to work other than that which forms the basis of the exemption." (Emphasis ours.)

The case of *Keegan et al.* v. *Ruppert et al.*, 7 Labor cases 61,726, involved a garage worker, who likewise was specifically exempt from the Act, but, upon showing that a substantial part of his duties were performed in non-exempt work, he was allowed to recover. In *Ralph Knight Inc.* v. *Mantel*, 7 Labor Cases, 61,591, plaintiff was allowed to recover, and the Court stated therein that the Act must be liberally construed to effect its purpose; that all employees in interstate commerce, so far as is reasonably possible, should be made subject to the provisions of the Act; that exemptions would tend to defeat

its purpose, and therefore such exemptions should be strictly construed.

The Appellate Court failed to adhere to the foregoing cases, and evolved a new and unknown theory of law to the effect that the true determinant is whether an employee performs "any" duties which substantially affect safety of operation, rather than whether the duties affecting safety are substantial. This theory was volunteered by that Court and was not urged by Respondent. The Court cited no authority for that theory. In fact, such authorities cannot be found. If this decision was allowed to stand, it would thwart and narrow the far reaches of the Labor Act and tend to deprive thousands upon thousands of employees, engaged in the interstate motor carrier industry, of the benefits of the Labor Act. Therefore, plaintiff appealed to the Supreme Court of Illinois and urged the foregoing points to reverse the decision. The Labor Administrator, realizing the importance of the case, sought to intervene in the Supreme Court as was his duty. His stated intention was to show that the final decision in this case will affect thousands of employees of the motor carrier industry throughout the State of Illinois and the nation at large; that he desired to file a brief as *amicus curiae* on the question: May an employee who performs "any" duties which affect safety of operation of motor vehicles be exempt from the overtime provisions of Section 7(a) of the Labor Act by virtue of Section 13(b)(1) thereof? He further stated that the point involved is one of first impression, and has never before been decided or presented to that Court or to the United States Circuit Court of Appeals or to the Supreme Court of the United States. Nevertheless, the Administrator's motion to file such a brief was denied. Thereafter that Court affirmed the decision, even after

admitting that the Appellate Court may have been in error as to this true test or determinant.

The Supreme Court held the true determinant or test is whether the duties affecting safety or operation were "*substantial*" and not whether petitioner performed "any" or "some" duties. If the Supreme Court's pronouncement of the true determinant or test is correct, then the decision of the Appellate Court was not justified and should have been, of necessity, reversed and the judgment of the trial Court affirmed. There was no adjudication in the record that petitioner's duties in safety of operation were *substantial*, but there is a specific trial Court finding that the *major* portion of petitioner's duties did *not* affect safety of operation, which means that the duties affecting safety were in fact not substantial. It is thus clear that the determinants or tests formulated by the Appellate and Supreme Courts did not warrant reversal of the judgment of the trial Court. The trial Court's specific finding that the *major* portion of plaintiff's duties were not performed in safety of operation means that the converse must be true, that only a small or minor portion of time was left for him to devote to safety of operation. The Appellate Court of Illinois, in *Zenith Radio Distributing Corp.* v. *Mateer*, 311 Ill. App. 263, has defined the meaning of the word "major" as follows:

> "The word 'major,' as used in Bulk Sales Act, which requires compliance with the Act in the case of a major part of a seller's business, must be construed in its ordinary meaning and, as so construed, means greater or larger."

Webster's New International Unabridged Dictionary defines "major" as greater in number, quantity or extent; as, the major part of the assembly; the major part of revenue.

It is respectfully submitted that this case is of great public interest and of sufficient importance. It involves the misapplication and disturbance of unanimity of federal decisions and interpretations of the aforesaid sections of the Labor Act and the Motor Carrier Act to merit the issuance of a certificate of certiorari by this court to the end that the decision of the Supreme Court of Illinois may be reversed and the judgment of the trial Court affirmed.

RICHARD S. FOLSOM,
HARRY L. YALE,
228 N. La Salle Street,
Chicago,
Attorneys for Petitioner-Plaintiff.

APPENDIX.

Opinion of the Appellate Court.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT:

This is an action brought by virtue of section 16 (b), for violation of the maximum hours provision (section 7), of the Fair Labor Standards Act of 1938 (52 U. S. Stats. 1060), designed to spread employment and maintain health. *Southland Gasoline Co.* v. *Bayley, et al*, 6 Labor Cases, 51159. Judgment was for plaintiff in the amount of $1,149.88. Defendant has appealed.

Defendant is a Missouri corporation, licensed in Illinois and engaged in interstate commerce as a motor carrier of freight, by which plaintiff was employed from October 1, 1939 to October 6, 1941. He claims that he worked 87 hours per week for the period from October 1, 1940 to October 6, 1941, during which defendant violated section 7 of the Act by refusing to pay him time and a half for all hours in excess of 42 hours per week during the period from October 1, to October 24, 1940; and for all hours in excess of 40 hours per week from October 25, 1940 to October 6, 1941, less one week's vacation. The maximum working hours are established in section 7 (a), (1), (2) and (3) of the Act.

Defendant's affirmative defense is that the nature of plaintiff's employment, exempted him from the provisions of the Act, (section 13) and brought him under the exclusive jurisdiction of the Interstate Commerce Commission, since his duties were those of "dock man", "loader" and "dock foreman" and directly connected with the safety of equipment and cargo in Interstate Commerce.

The trial court found in its judgment order entered December 28, 1942, that the plaintiff worked 87 hours per week during the period for which the suit was brought and that the *major portion* of the work performed by him during that period did not affect the safety of defendant's operations and that plaintiff was not exempted from the provisions of the Act. The defendant argues that the finding that the plaintiff is not exempted is erroneous as a matter of law and is against the manifest weight of the evidence; and also that the amount of the judgment entered exceeded the court's jurisdiction in plaintiff's fourth class action.

Section 13 (b) exempts from the provisions of section 7 of the Act any employee subject to the jurisdiction of the Interstate Commerce Commission under section 204 of the Motor Carrier Act of 1935 (49 U. S. Stats. 543). That section empowers the Commission to regulate the qualifications and hours of service of employees whose activities affect the safety of operation. *United States* v. *American Trucking Association,* 310 U. S. 534, 553. The decisive question on the merits is whether plaintiff is such an employee.

In the *Trucking Association case,* the court said that "the interpretation of the Interstate Commerce Commission and the Department of Labor are entitled to great weight". In *Ex parte* No. M. C.-2, Vol. 28 Interstate Commerce Commission Reports, page 125, the Commission interpreted the term "safety of operation" used in that case to include employees who devote a *substantial part* of their time to activities which directly affect safety of operation; that among such employees were "loaders", variously called "loaders, dock men or helpers", who devote a *large* part of their time to activities directly affecting safety of operation and whose sole duties are to *load and unload* motor

vehicles, etc. Plaintiff contends he is a checker, not a loader, and therefore, not within the Commission's interpretation. We believe that his duties—not the name given his position—are determinative. To preclude the exemption provided in Sec. 13 B of the Act from applying to him, plaintiff relies upon *McKeown* v. *Southern California Freight Forwarders*, 6 Labor Cases (U. S. District Court, Southern District of California) 61521; *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572; *Magann* v. *Longs Baggage Transfer Co.*, 39 Fed. Supp. 742; and mainly upon *Anuchick, et al.* v. *Trans-American Freight Lines*, 6 Labor Cases (U. S. District Court, Eastern District of South Michigan) No. 61,245. The facts in the first two, place the employee plainly outside the exemption; and in the third, a truck driver was found to be exempt. In the *Anuchick case*, the court found that certain employees devoted a *substantial part* of their time to work not directly affecting safety of operation and, on the theory that it was bound by the Department of Labor's interpretation of the term "substantial" in Bulletin No. 9, gave judgment for the employees. The interpretation in Bulletin No. 9 then prevailing was that "substantial" meant *in excess of 20%* of duties not connected with *loading and unloading*. Bulletin No. 9, as revised to October 1943, modifies the earlier interpretation to mean "the *greater part* of his time during any work week on non-exempt activities." We assume the court in the *Anuchick case* would have accepted this later interpretation had it then been effective and unless the employees there spent the *greater part* of their time on duties not directly affecting safety, would have held against them. These various interpretations suggest the difficulty of finding the proper rule here. The trial court apparently applied the later interpretation of the Department of Labor.

Defendant Terminal at 600 West 25th Street, Chicago, is the scene of three phases of motor carrier business—inbound freight, outbound freight and local freight. Trucks carrying freight originating locally and in foreign cities and States, are unloaded by gangs of defendant's employees. A gang usually consists of 3 or 4 men—a checker, caller, sorter and packer. The checker directs the gang's operation. Day and night foremen supervise the activities of all the gangs. Incoming freight is unloaded and deposited according to its destination on the dock in various sections at the direction of the checker; likewise under the direction of the checker, it is removed from these sections and loaded on appropriate outgoing trucks. It is loaded according to size and weight; heavy weighted or "bottom freight" being distributed in the lower part of the truck and lighter weighted or "balloon freight" is placed at the top. This plan is followed in the interest of safety of equipment and of freight. Testimony pertinent to the issue on the merits is that, as checker, plaintiff supervised and directed the unloading and disposition of incoming freight and the collecting and loading of outgoing freight and that he watched the disposition of the weight of the freight in loading. The dispute in the testimony arises as to the quantity of plaintiff's activities devoted to these particular duties. Plaintiff says that most of the outbound freight was done at night, while he worked mostly days; that not much loading was done during his hours, but that, whatever took place, was under his direct charge. The defense testimony is that inbound and outbound freight was equally divided during the day—inbound usually during the night and outbound between 8 A. M. and midnight.

We believe none of the foregoing interpretations are helpful in determining this issue. Section 204 of the Motor Carriers Act is designed to provide safety in an efficient

motor transportation system: *United States* v. *American Trucking Association*, 310 U. S. 534. There is no question that some part of plaintiff's work week was devoted to the direction and supervision of the loading of interstate motor freight carriers. There is no question either that the loaders in his gang were exempted from Section 7 of the Fair Labor Standards Act. We think, therefore, that with greater force, plaintiff comes within the exemption for, if the loaders are exempt because the manner in which they work affects the safety of the operation of defendant's motor vehicles, certainly the duties of plaintiff, who planned and directed the loading, affect that safety. Considering the purpose of the Motor Carriers Act, we believe that the true determinant is whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial.

We need consider no other point.

It is our conclusion that the finding that plaintiff is not exempted is erroneous as a matter of law and that the judgment based thereon should be and it hereby is reversed and the cause is remanded with directions to enter judgment for costs for defendant against plaintiff.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS TO ENTER JUDGMENT FOR COSTS FOR DEFENDANT AND AGAINST PLAINTIFF.

BURKE, P. J. and LUPE, J. Concur.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 138 22

MAX LEVINSON,

Petitioner,

vs.

SPECTOR MOTOR SERVICE, a corp.,

Defendant-Respondent.

BRIEF FOR APPELLANT

RICHARD S. FOLSOM,
HARRY L. YALE,
228 N. LaSalle Street,
Chicago, Illinois,
Attorneys for Petitioner.

BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 139

MAX LEVINSON,

Petitioner,

vs.

SPECTOR MOTOR SERVICE, a corp.,

Defendant-Respondent.

BRIEF FOR APPELLANT

OPINIONS BELOW.

The opinion of the Supreme Court of Illinois, filed on January 17, 1945, is reported in 389 Ill. 466.

The opinion of the Appellate Court of Illinois, Third Division, was filed on June 30, 1944, and is reported in 323 Ill. App. 505.

STATEMENT WITH RESPECT TO JURISDICTION.

This proceeding was commenced by filing a petition for certiorari to review a final judgment of the Supreme Court of Illinois, entered on January 17, 1945, pursuant to the opinion of that court filed the same day. (P.R. 46.)

The jurisdiction of this Court is invoked under Rule 38, paragraph 5 (a) and section 1, Amendment XIV U. S. Constitution.

Section 13 (b)(1) of the Fair Labor Standards Act (Section 213 (b)(1), Title 29, U.S.C.A.) sets forth that the provisions of Section 7 of the Act dealing with maximum hours, and overtime compensation, under which this action was brought:

> "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935; * * *." (P.R. 3.)

Because of the defense interposed by respondent, the U. S. Motor Carrier Act was drawn in, (P.R. 5), the pertinent part of which is:

> "It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicles as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Trial was had without a jury in the Municipal Court of Chicago and judgment was rendered for petitioner based on specific findings of fact, among which was a finding

that petitioner worked 87 hours per workweek and that the major portion of petitioner's duties by him performed did not affect safety of operation within the meaning of the Labor Act. (P.R. 7.)

Respondent appealed to the Appellate Court of Illinois. It became necessary for that court to give utmost consideration to the interpretation of the Labor Act by Federal District Courts and the United States Supreme Court; to take into account interpretations of the Administrator of the Labor Act; place a proper construction on Section 204 (a)(1) and (2) of the Motor Carrier Act of 1935 and decisions of the Interstate Commerce Commission.

But the Appellate Court disregarded the foregoing and reversed the judgment on federal grounds, as clearly shown by its opinion stating as follows:

> "There is no question that some part of plaintiff's workweek was devoted to the direction and supervision of the loading of interstate motor freight carriers. There is no question either that the loaders of his gang were exempt from Section 7 of the Fair Labor Standards Act. We think, therefore, that with greater force plaintiff comes within the exemption for, if the loaders are exempt because the manner in which that work affects the safety of the operation of defendant's motor vehicles, certainly the duties of plaintiff who planned and directed the loading affected that safety. Considering the purpose of the Motor Carrier Act, we believe that the true determinant is whether an employee performs any duties which substantially affect the safety of operation rather than whether the duties affecting safety are substantial.
>
> We need consider no other point.
>
> It is our conclusion that the finding that plaintiff is not exempted is erroneous as a matter of law, and the judgment based thereon should be, and is, hereby reversed. * * *"

The Appellate Court erroneously asserted that the loaders in Petitioner's gang were exempt from section 7 and that therefore, with greater force, Petitioner came within the exemption. There was no issue, evidence, or finding in the trial court that the sole duties of those loaders was to load and unload and that they spent a substantial part of their time loading, as defined by the Interstate Commerce Commission in M.C.C. 28, 125 at 134. The Court's conclusion being based on this wrong premise, it follows that the conclusion itself is wrong.

That Court evolved a new theory in holding that the test of exemption applicability is whether an employee performs *any* duties rather than whether such duties are substantial. This theory is diametrically opposed to the prevailing Federal Acts, decisions and interpretations. The court thus thwarted and distorted the Labor Act to such an extent that, if allowed to become the law, all employees in the freight industry are at once deprived of Labor Act coverage because they may have occasionally lifted a package, or changed a label, or checked the damage to some parcel.

Petition for rehearing was denied. A certificate of importance was granted for appeal to the Illinois Supreme Court on the ground that this cause involves *questions of law of importance on account of principle and collateral interests.* (P.R. 27.)

Petitioner accordingly appealed to the Illinois Supreme Court which affirmed the decision of the Appellate Court on federal grounds. (P.R. 46.) The finding of fact of the trial Court that the major part of petitioner's duties did not affect safety of operation was not disturbed by the Appellate Court nor by the Supreme Court.

The determinant formulated by the Appellate Court was the only basis for the reversal of the trial court judg-

ment. The Supreme Court admitted this to be erroneous. Inasmuch, as this was the only theory upon which that decision was founded, the plain duty of the Supreme Court was to reverse the Appellate Court and affirm the trial court judgment.

The Supreme Court's decision states as follows (P.R. 52):

> "The Appellate Court found that the loaders in appellant's gang were exempted from Section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation.
>
> "The substantial effect of the comment of the Appellate Court was to the effect that the quantity of petitioner's activities was not the true test of exemption from the Fair Labor Standards Act, yet said Court did hold appellant was in the same position as loader."

From the above it is evident that the Court based its decision on the Appellate Court's erroneous assertion that the loaders were exempt and therefore, Petitioner was exempt. This assertion, as stated before, had no basis in the trial record and the Supreme Court itself designates it as a comment. Moreover, it also appears that the Supreme Court infers that the substantial effect of the Appellate Court comment was that the quantity of petitioner's activities was not the true test of the exemption. This is clearly a misconception and leaves no room for inferences. It is limited and narrowed to their formula by their express words. They state in the decision: "We need consider no other point." The test or determinant formulated in said decision is that one who performs *any* duties in safety of operation is exempt from the benefits of the Labor Act. It is clear that both the Appellate and the Supreme Court decisions are founded on a misin-

terpretation of the Labor Act, as well as the Motor Carrier Act and pertinent decisions.

The Interstate Commerce Commission is vested by law with sole power to decide and rule with respect to employees over whom it asserts jurisdiction. Repeated demands have been made on that Commission to extend its jurisdiction over all motor carrier employees but it consistently refuses to do so. *U. S. v. Am. Trucking Ass'ns*, 310 U.S. 534. Under the above decisions no freight industry employee can sustain a claim to Labor Act coverage. Thus the decision in fact invades the province of the Commission's jurisdiction by inclusion of types of employees whom they consistently excluded by express refusal.

In *Illinois Steel Co.* v. *B. & O. R. R. Co.*, 320 U. S. 50, the basis of the suit was to recover freight charges, and involved clauses of the Uniform Bill of Lading adopted by the Interstate Commerce Commission and prescribed by Congress for interstate shipments. This Court held that the case presents a Federal question, the determination of which by a State Court is subject to its review, and a writ of certiorari was granted on the ground that interpretation of that Act under the circumstances of the case is a question of public importance.

In *Walton* v. *Southern Package Corporation*, 320 U. S. 540, plaintiff sued in the State Court under the Fair Labor Standard Act and recovered. The Mississippi Supreme Court reversed the judgment after which petition for certiorari was filed in the United States Supreme Court. The petition was granted by this Court and subsequently affirmed the judgment of the Trial Court for the reason that the petitioner there was found to be entitled to coverage under the Labor Act.

In *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, this Court ruled similarly on a petition for a writ of

certiorari in an action under the Federal Employers' Liability Act.

In *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328, the writ issued to reverse an erroneous state court decision which was based upon misapplication of the Bankruptcy Act.

In *McCullough* v. *Smith*, 293 U. S. 228, the writ was granted to reverse an erroneous decision misapplying the World War Veterans' Act.

In *Atlantic Coast Line R. Co.* v. *Temple*, 285 U. S. 143, the writ was granted where the state court, although purporting to apply the statutory tests of liability under the Federal Employers' Liability Act as established in prior Supreme Court decisions, has in fact permitted recovery upon proof insufficient to sustain a finding of negligence.

Sovereign Ry. Co. v. *Moore*, 284 U. S. 581, has in fact ignored or misapplied the statutory rule relating to assumption of risk.

Atchison T. & S. F. Ry. Co. v. *Saxon*, 284 U. S. 458, has sustained a recovery without proof that the alleged negligence was the proximate cause of the injury.

In *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, its judgment fails to give effect to the established rules relating to injuries resulting from disobedience of rules or orders.

To the same effect are the cases of *St. Louis S. W. Ry. Co.* v. *Simpson*, 286 U. S. 346; *Southern Ry. Co.* v. *Youngblood*, 286 U. S. 313; and *same* v. *Dantzler*, 286 U. S. 318.

In *Denton* v. *Yazoo and M. V. R. Co.*, 284 U. S. 285, the writ issued to inquire whether the state court had rightly applied the regulations and the rules of the law of master and servant in determining whether a negligent worker

was the servant of the U. S. or of a railroad company at the time of the injury.

In *St Louis I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 293, a refusal by a state court to give a federal statute or treaty the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right or immunity under the laws of the U. S.

Hopkins Fed. Sav. & Loan Assn. v. *Cleary*, 296 U. S. 315, 332.

Petitioner had no occasion to raise the question of due process in the trial court. Respondent succeeded in reversing the judgment on appeal. Petitioner then did raise the due process question in the Supreme Court of Illinois, which, under the circumstances, is to be considered timely. (P.R. 60-61.)

STATEMENT OF CASE.

On April 16, 1943, petitioner filed suit in the Municipal Court of Chicago, Illinois, against respondent Spector Motor Service, Inc. He sued under the Fair Labor Standards Act and alleged that respondent was a motor carrier in interstate commerce; that from October 1, 1939 to September 30, 1949, he was employed as a laborer, for which period no claim was made; that from October 1, 1940 and up to and including October 6, 1941, he was employed on a different basis at a salary of $150.00 per month, not as a laborer but to perform divers duties; that he worked 87 hours per week and was refused overtime pay. (P.R. 34.)

Respondent's defense was that its activities and those of *its employees are* under the specific jurisdiction of the Interstate Commerce Commission by reason of the U. S.

Motor Carrier Act of 1935; that *petitioner actually worked as a dockman, loader and dock foreman,* and his duties were directly connected with the safety of vehicles. (P.R. 5 and 6.)

Trial was had before that Court without a jury. The substantial effect of petitioner's testimony was that he was originally hired as a laborer; that for the period here involved, his status of employment was changed to that of a checker and to perform other fluctuating duties (P. R. 10); that he worked 87 hours per week (P. R. 12); that he had charge of hiring and had to call the Union for help; that he had charge of keeping the payroll down to a minimum; that he marked bills and brought them into the office of the rate clerk to be billed (P.R. 11); that the amount of time he put in on local freight would be in spurts, and would amount to quite a few hours; that with reference to incoming freight, he used to check the loads and have it unloaded in the terminal and the same operation was used in putting it in separate sections where it belonged; that about one-half day's work was consumed in the work of unloading; that outbound freight was done mostly at night, beginning on an average about 4:00 or 5:00 P.M.; that he had to stay there until the night foreman came in about 7:00 or 8:00 P.M. to give him instructions (P.R. 12); that it was his business to see that men he hired get an application, a time card, social security card, to see that they punched their card on time when they started and get through at noon time, etc.; when a man wanted to quit, it was up to him to O.K his time card and see that the young lady makes a draft for his pay; that he had to watch in case a man was off to see that his time card was marked accordingly; that the work on time cards for day and night men was done every day and on week-ends, and consumed quite a few hours daily (P.R. 11); that he had

nothing to do with carrying packages into the trucks on outbound freight (P.R. 11); that he used to attend staff meetings which would last about two or three hours; that he had to confer with the auditor a couple of times a week on account of the payroll (P.R. 11); that he had to watch that bills were made out right; that sometimes there were mistakes in the weight of freight pieces; that if that happened he had to go to the proper parties to correct it (P.R. 12); that after the terminal manager hired lease operators, he turned them over to petitioner to make out an application and then have the terminal manager approve it (P.R. 12); that there is a lot of checking to be done to see that packages are not pilfered; that if anything is wrong an OSD is made out (P.R. 13); that he had to supervise all packages taken off from trucks, and see that they were sorted, piled and placed according to different and proper sections in the terminal so they did not fall and hurt somebody or break up the package (P.R. 13); that he did not have charge of very much loading and that such loading was done by the night men (P.R. 11, 12); that to a certain extent a checker watches the loading of the truck and the distribution of the weight in the truck so that heavy machinery pieces are placed in the bottom and balloon pieces on top. (P.R. 13, 14.)

Thereafter, special findings of fact were entered by that Court, one of the findings, being that the major portion of petitioner's duties did not affect safety of operation. Judgment was rendered against respondent in the sum of $1,149.88 and court costs, including liquidated damages and attorney's fees. (P.R. 6.)

Respondent appealed to the Appellate Court of Illinois. That Court reversed the trial court judgment on the theory that, as a matter of law, if petitioner "performed any" work affecting safety of operation it is sufficient to de-

privq him of coverage under the Fair Labor Standards Act.

Petitioner appealed to the Illinois Supreme Court. In due time, L. Metcalf Walling, Administrator of the Wage and Hour Division of the Department of Labor, moved for leave to file a brief as *amicus curiae*. (P.R. 41.)

In his suggestions in support of the motion, he stated that his interest is that of the public expressed in remedial statute of great importance designed to eliminate sub-standard labor conditions; that the responsibility of administering the Act is placed upon him; that he has a real and substantial concern in the interpretations and rulings that may be made in employee suits and the effect they may have on the administration of the Act; that this appeal involves the interpretations of Section 204 (a)(1) and (2) of the Motor Carrier Act and Section 13(b)(1) of the Fair Labor Standards Act; that the decision will affect thousands of employees of motor carriers throughout Illinois and the United States; that his brief will concern the issue whether a "motor carrier employee who performs any duties" in safety of operation of motor vehicles is exempt from the overtime provision; that this is of first impression in Illinois, and that this point had not been decided by the United States or any United States Court of Appeals. The Court denied the motion of L. Metcalf Walling and affirmed the Appellate Court decision.

Petitioner filed in due time a petition for rehearing, which the Supreme Court denied on March 19, 1945. (P.R. 63.)

SPECIFICATIONS OF ERRORS.

The Illinois Supreme Court erred in attempting to broaden the jurisdiction of the Interstate Commerce Commission inasmuch as the Commission, having sole power to do so, limited its jurisdiction to (1) mechanics and other garage workers, (2) loaders, (3) drivers, and (4) drivers' helpers.

The Illinois Supreme Court erred in disregarding the Labor administrator's interpretation and Federal decisions to the effect that all other employees are clearly not within the exemption.

The Illinois Supreme Court erred in its failure to hold that petitioner was a checker and performed more than 50% non-exempt duties and was therefore not in any of the classes of employee under whom the Commission asserted jurisdiction.

The Illinois Supreme Court erred in disregarding the special findings of the trial court that the major portion of petitioner's duties did not affect safety of operation of motor vehicles, and in reversing the judgment based on such finding.

The Illinois Supreme Court and the Appellate Court erred in assuming that petitioner was in the position of a loader because there is no evidence in the record that he was a loader and the testimony shows that he worked as a checker and performed fluctuating duties.

The Illinois Supreme Court erred in basing its affirmance on a mere Appellate Court comment that the loaders in petitioner's gang were exempt from the Labor Act when in fact no issue was presented and no evidence heard as to the status of such loaders.

SUMMARY OF ARGUMENT.

(A) Where, as here, petitioner was employed as a checker and to perform fluctuating duties, and more than 50% of his workweek was spent in performing such duties which did not directly affect safety of operation of motor vehicles, he is entitled to coverage under the Labor Act.

(B) A reviewing court's decision cannot be based on a guess or surmise and where, as here, it does not appear that the trial court found that petitioner's sole duties were to load and unload and that he spent a substantial part of his workweek in the performance of such duties, it was erroneous to reverse a judgment in his favor and deprive him of the benefits of the Labor Act.

Bechtel v. *Stillwater Milling Co.*, 33 F. Supp. 1010.

Crean v. *Moran Transportation Co.*, 57 F. Supp. 212.

Faulkner v. *Little Rock Furniture Co.*, 32 F. Supp. 590.

Kasofsky v. *Champion Trucking Co.*, 181 Miss. 470.

Robbins v. *Zabarsky*, 44 F. Supp. 867.

Tineralla, et al. v. *Des Moines Transportation Co.*, 41 F. Supp. 798.

Zenith Radio Dist. Corp. v. *Mateer*, 311 Ill. App. 263.

Overnight Motor Transportation Co. Inc. v. *Missel*, 316 U. S. 572.

McKeown v. *Southern California Freight Forwarders*, 6 Labor Cases, 61,521.

Anuchick v. *Transportation Freight Co.*, 6 Labor Cases, 61,245.

Keegan et al. v. *Ruppert et al.*, 7 Labor Cases, 61,726.

Ralph Knight Inc. v. *Mantel*, 7 Labor Cases, 61,591.

U. S. v. *American Trucking Associations*, 310 U.S. 546.

ARGUMENT.

The trial Court found in the instant case, as a matter of fact, that plaintiff worked 87 hours during each week and was not paid for overtime, which was in violation of Section 7(a) of the Labor Act. Most important of all, the trial Court found specifically that the major portion of petitioner's work did not affect safety of defendant's operation within the meaning of Section 13(b) of the Act, and was not exempt under said Section. That finding was never disturbed by either of the appellate tribunals. It is the basis upon which judgment was rendered.

It is possible to gather sentences, or portions thereof, from the testimony in the record to show that petitioner performed *some* duties affecting safety of operation. But that is immaterial. Petitioner never contended not having performed some duties that affected such safety. However, it is contended that this was but to a minor extent.

It is even possible to show that one witness stated one thing or another which is different than what petitioner testified to. But the trial judge heard the witnesses, considered their interests, saw their demeanor, and judged accordingly. Neither the Illinois Appellate nor Supreme Court attacked or impaired that judge's findings as not being based on sufficient evidence. Neither decision disturbs the finding that the duties which he performed were numerous and of a wide variety and that the major portion of his work for the period sued did not affect safety of operation of motor vehicles within the meaning of the appropriate sections. (P.R. 7.)

A number of cases have already been adjudicated against interstate freight employees who sought the benefits

of the Labor Act. These decisions are always cited by interstate shippers who habitually resist claims for labor act coverage. No doubt many of these cases may be brought into discussion here. At first glance they may appear relevant. In reality they have no application whatsoever.

For example: in *Bechtel* v. *Stillwater Milling Co.*, 33 Fed. Supp. 1010, plaintiffs alleged they were truck drivers.

In *Epps* v. *Wheathers*, 49 F. Supp. 2 plaintiffs were drivers of trucks or helpers or loaders who crate, pack and load or unload trucks.

In *Faulkner* v. *Little Rock Furniture Mfg. Co.*, 32 Fed. Supp. 590, plaintiff was truck driver or driver's helper.

In *Tineralla et al.* v. *Des Moines Transportation Co., Inc.*, 41 Fed. Supp. 798, plaintiff alleged he was a truck driver.

Kasofsky v. *Champion Trucking Co., Inc.*, 181 Misc. 470, the court stated:

> "had plaintiff's duties been only as he claimed and testified to, he would have been entitled to the benefits of the Fair Labor Standards Act. However, it seems to me that the fair preponderance of the evidence clearly shows that plaintiff was an experienced driver's helper and loader. He devoted a substantial part of his time to the excercise of such duties."

This case is directly contrary to the case at bar in that the trial court specifically found that the plaintiff's duties affected safety of operation.

In *Robbins* v. *Zabarsky*, 44 Fed. Supp. 867, plaintiff alleged he was employed to repair and service trucks. He also alleged he was foreman of Mechanics but the Court stated his allegation of the nature of his duties was sufficient to show he was exempt. It is not necessary to determine the effect of his allegation of being a foreman.

In *Crean* v. *Moran Transportation Co.*, 57 Fed. Supp. 212, the trial Court *found* that the "Checkers", "Callers", and "Wheelers" all devote a *substantial* amount of their time to safety of vehicle operations, the checkers were employed as checkers only, and not to perform a wide range of fluctuating duties, and it appeared in that case that in their Union contract with defendant, plaintiffs, including checkers, were all termed *dockmen*. This case is entirely different than the case at bar in that petitioner performed fluctuating duties, and there was no Union contract terming petitioner a *dockman* and the trial Court did not find that petitioner devoted a substantial time to checking, but on the contrary, entered a special finding that the major portions of his duties did not affect safety of operation, and was, therefore, entitled to the benefits of the Labor Act.

Nearly all of the above cases are vulnerable to a motion to dismiss because it appears on the face of the complaint that plaintiffs are either drivers, drivers' helpers, loaders or mechanics. They are plainly within either one of the four classes of employees subject to the Commission's jurisdiction.

But the controlling cases are those which involve fluctuating duties of employees and those cases where less than a substantial amount of work is performed by claimants directly affecting safety of operation of motor vehicles.

We believe the crucial decision to be the case of *United States* v. *American Trucking Associations*, 310 U. S. 546. Many illuminating points are contained therein. It is there held that Congress did not intend that all freight employees be held exempt. On the contrary, only the employee *directly engaged in the operation of the motor vehicle* may be considered as exempt. This was a fore-

runner to *Overnight Motor Transportation Co., Inc.* v. *Missel*, 316 U. S. 572. The plaintiff in that case was a rate clerk and performed other fluctuating duties. Under the decision of this Court, Missel was accorded the benefits of the Labor Act. This decision became the criterion for similar cases. It established the principle that an interstate freight employee may perform some duties in safety of operation and yet not necessarily be deprived of the Labor Act benefits. Federal District Courts then rendered decisions accordingly.

In *McKeown* v. *Southern California Freight Forwarders*, 6 Labor Cases, 61,521, involved a checker of freight who also frequently assisted in loading and unloading and was allowed to recover. The situation is in all respects similar to the instant case because petitioner, too, was a checker and performed other duties. We think this case was not given adequate consideration at all by the reviewing Courts or Respondent.

In *Aruchick* v. *Transportation Freight Co.*, 6 Labor Cases, plaintiffs were mechanics who, as a class, were specifically under the jurisdiction of the Interstate Commerce Commission. Yet, on their showing that a *substantial* part of their duties were performed in *non-exempt* work, they were allowed to recover. It was there stated:

> *"Technically there isn't any employee of a transportation company that isn't indirectly doing work affecting safety of operation but we believe the Interstate Commerce Commission had a definite thought in mind in rendering its decision.*
>
> "In our interpretation of the theory and reasoning of the Interstate Commerce Commission as set forth in its decision of March 1941—and in fact if there is to be a division in category of defendant's employees—it is evident that all plaintiffs here (2830) are concerned with the safety and size of car and that any activity affecting 'safety of operation' is

incidental. We therefore hold that these plaintiffs are not subject to the rules and regulations of the Interstate Commerce Commission affecting their qualifications and maximum hours of service. Such we believe to be the interpretation of their own powers by the men who know." (Emphasis ours.)

Keegan et al. v. *Ruppert et al.*, 7 Labor Cases, 61,726, involved a garage worker who oiled, greased, gassed and washed interstate motor vehicles. Defendant contended that he was a mechanic specifically exempt from the Act, but, upon showing that his duties did not *directly* affect safety of operation, he was allowed to recover.

In *Ralph Knight Inc.* v. *Mantel*, 7 Labor Cases, 61,591, plaintiff was allowed to recover, and the Court stated that the Act must be liberally construed to effect its purpose; that all employees in interstate commerce, so far as is reasonably possible, should be made subject to the provisions of the Labor Act; that exemptions would tend to defeat its purpose, and therefore such exemptions should be strictly construed.

The decision in 28 M.C.C. holds that the Interstate Commerce Commission emphasized its unwillingness to include many classes of freight employees. At page 135 it is shown that many carriers employ men whose sole duties are those of a dispatcher; that by an error in judgment they may assign a vehicle of insufficient size and weight-carrying capacity to transport the load or cause a driver to duty who is sick, fatigued or otherwise not in condition to operate the vehicle or requires or permits the vehicle to depart when the roads are icy and the country to be traversed is hilly, an accident may result. Yet, the Commission held that dispatchers are not considered under their jurisdiction.

The Appellate Court failed to adhere to the foregoing cases and evolved a new theory of law. It held the true

determinant is whether an employee performs "any" duties which substantially affect safety of operation, rather than whether the duties affecting safety of operation, are substantial. This theory was volunteered by that Court. It was not urged by respondent. Respondent's position was that all its employees are exempt and that petitioner was actually working as a dockman, loader and dock foreman (P.R. 5), or in the alternative that he was an executive. These defenses relate to exemptions and therefore it was incumbent upon respondent to sustain the burden of proof.

That decision would tend to thwart and narrow the far reaches of the Labor Act and tend to deprive thousands upon thousands of employees, engaged in the interstate motor carrier industry, of its benefits. Therefore, the Labor Administrator sought to file a brief as *amicus curiae* on the question: May an employee who performs "any" duties which affect safety of operation of motor vehicles be exempt from the overtime provisions of Section 7 (a) of the Labor Act by virtue of Section 13(b)(1) thereof? He further stated that the point involved is one of first impression, and has never before been decided or presented to that Court or to the United States Circuit Court of Appeals or to the Supreme Court of the United States. But his motion to file such a brief was denied.

The United States and Federal District Courts regard the Labor Administrator's interpretations of its provisions with great weight. The following portion from his Interpretative Bulletin No. 9 was cited:

> "It should be noted that any truck driver, drivers' helpers, mechanic or loader employed by a common, contract or private carrier, who spends the greater part of his time during any workweek on non-exempt activities, such as producing, processing or manufacturing goods, *warehouse or clerical work, or other*

> *type of work which does not affect safety of operations* is not within the scope of the exemption contained in Sec. 13(b)(1). It is the opinion of the Division that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time in work other than that which forms the basis of the exemption." (Emphasis ours.)

The Illinois Supreme Court held the true determinant or test is whether the duties affecting safety of operation were *substantial* and not whether petitioner performed *any* or *some* duties. If that Court's pronouncement of the true determinant or test is correct, then the decision of the Appellate Court was not justified and should have been, of necessity, reversed and the judgment of the trial Court affirmed because there was no adjudication in the record that petitioner's duties in direct safety of operation of motor vehicles were *substantial*. On the contrary, the trial Court found petitioner's duties were numerous and that the *major* portion of petitioner's duties did *not* affect safety of operation. This means that the duties affecting safety were in fact not substantial. It is thus clear that the determinant or test formulated by the Supreme Court is erroneous first as a determinant and second as applied in the instant case. It should be remembered that respondent failed to meet the burden of proving that petitioner was a *loader whose sole duties were to load and unload and that he spent a substantial part of his workweek in such duties*. The trial Court's specific finding makes it clear that more than 50% of plaintiff's duties did not relate to safety of operation. Conversely, it can be said that only some fraction of duties was performed in such safety. The Appellate Court of Illinois, in *Zenith Radio Distributing Corp.* v.

Mateer, 311 Ill. App. 263, has defined the meaning of the word "major" as follows:

> "The word 'major', as used in Bulk Sales Act, which requires compliance with the Act in the case of a major part of a seller's business, must be construed in its ordinary meaning and, as so construed, means greater or larger."

Webster's New International Unabridged Dictionary defines "major" as greater in number, quantity or extent; as, the major part of the assembly; the major part of revenue.

Under the pertinent Illinois statute the Appellate Court may make a finding of fact different from the trial court. If such finding is made it ends the case and the Illinois Supreme Court is without jurisdiction to review the decision. In the instant case however, the Appellate Court made no finding of fact different than the trial court. It expressly states that its decision is made "as a matter of law." It granted a certificate of importance to review its decision "because it involves questions of law of importance on account of principal and collateral interests." It said:

> "It is our opinion that the finding that plaintiff is not exempted is erroneous as a matter of law. . . ."

A finding of fact means what it says. Nowhere in the opinion does it appear that the trial Court's finding is not based on sufficient evidence or find the facts to be different. The Appellate Court simply and plainly held that the trial Court did not correctly apply the law. The fact that the Illinois Supreme Court did review the judgment is sufficient to indicate that the whole case revolves around the questions of law and not questions of fact.

It is respectfully submitted that this case is of great public interest and importance. It involves the question

of the distortion, misapplication and disturbance of unanimity of Federal decisions and interpretations of the pertinent sections of the Labor and Motor Carrier Acts. This case therefore merits consideration of this Court to the end that the distortion and misapplication be rectified and the decision of the Illinois Supreme Court reversed and the judgment of the trial Court affirmed.

Respectfully submitted,

RICHARD S. FOLSOM,
HARRY L. YALE,
228 N. La Salle Street,
Chicago, Illinois,
Attorneys for Petitioner-Plaintiff.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 138 · 22

MAX LEVINSON,

Petitioner,

vs.

SPECTOR MOTOR SERVICE, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

HARRY J. LUBIE,
JOSEPH L. GOLDEN,
MAURICE P. GOLDEN,
DAVID AXELROD,
39 S. La Salle Street,
Chicago, Illinois,
Counsel for Respondent.

ROLAND RICE,
Of Counsel,
1424 16th St., N. W.,
Washington 6, D. C.

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Summary of Argument.

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(b) The Appellate Court of Illinois rightly held and the Supreme Court of Illinois rightly affirmed that the petitioner is included within the class of employees who are specifically exempted from the operation of the Fair Labor Standards Act of 1938, but are under the jurisdiction of the Interstate Commerce Commission 5

II. Under the Statutes of Illinois, the Appellate Court has power and authority to make a final determination of a case different from that of the trial court, where a trial was had without a jury. Findings of fact by the Appellate Court may not, under the Illinois practice, be reviewed by the Illinois Supreme Court in a case at law 9

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 139.

MAX LEVINSON,

Petitioner,

vs.

SPECTOR MOTOR SERVICE, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 389 Illinois Supreme Court Reports at page 466 (advance sheets, 389 Ill. No. 6).

STATEMENT MAKING AGAINST JURISDICTION.

Petitioner has not appended to his petition a copy of the opinion of the Supreme Court of Illinois, as required by rule 12, paragraph 1 of this Court.

The case at bar was decided by both the Appellate Court (Petn. 19-23) and the Supreme Court (Rec. 63) of Illinois

solely on the ground that, *as a matter of fact, petitioner's duties substantially affected the safety of operation* of respondent's motor vehicles, engaged in interstate commerce and that consequently, as a matter of law, petitioner was exempted from the provisions of Section 7 of Fair Labor Standards Act, pursuant to the provisions of Section 13 (b) (1) of said Act.

This case does not involve the interpretation of either the Fair Labor Standards Act or the Motor Carrier Act of 1935. Petitioner has cited no case in which this Court took jurisdiction under circumstances similar to those in the case at bar.

If petitioner desired to contend that, for any reason, he was deprived of due process of law, he should have raised the point in Supreme Court of Illinois, which he failed to do.

No substantial or important question of law is presented by this record.

The entire issue below was one of fact.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner's "Summary Statement of Matters Involved" is incorrect and incomplete.

The petitioner filed, in the Municipal Court of Chicago, a suit against the respondent for overtime wages alleged to be due under the provisions of the Fair Labor Standards Act. The respondent's defense was that petitioner was employed as a dockman, loader and foreman and that his duties affected the safety of operation of respondent's vehicles operated by it as a common carrier of freight in interstate commerce by motor vehicle (R. 9); that the matter of regulation of petitioner's wages and hours, therefore, came under the exclusive jurisdiction of the Interstate Commerce Commission. The trial court held that the petitioner's duties did not substantially affect safety of operation. On appeal by the respondent to the Appellate Court of Illinois, the Appellate Court reversed the trial court and held that the petitioner's duties substantially affected the safety of operations. (Petn. 23.) The judgment of the Appellate Court was affirmed by the Supreme Court of Illinois. (R. 64.)

The statement, at page 3 of his petition, that the Appellate Court of Illinois reversed the judgment of the trial court "on the theory that, as a matter of law, if petitioner 'performed any' work affecting safety of operations it is sufficient to deprive him of coverage under Fair Labor Standards Act," is a deliberate distortion of the language of the Appellate Court and is grossly misleading. What the Appellate Court did say was:

> "* * * we believe that the true determinant is whether an *employee performs* any duties which *sub-*

stantially affect the safety of operation . . . (Emphasis supplied.)

. . . We believe that his duties and not the name given to his position are determinative." (Petn. 23.)

The Supreme Court of Illinois, affirming the decision of the Appellate Court, said:

"The Appellate Court found that the loaders in Appellant's gang were exempted from Section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation.

The substantial effect of the comment of the Appellate Court was to effect that the quantity of plaintiff's activity was not the true test of exemption from the Fair Labor Standards Act, yet said court did hold the appellant was in the same position as the loaders.

The Appellate Court may be in error in the reasons given for its judgment, but, *under the facts as found by the court,* the employee came within the same exemption as loaders, dockmen and helpers.

For the reason aforesaid, the judgment of the Appellate Court is affirmed." (Rec. 64.) (Emphasis supplied.)

THE QUESTION PRESENTED.

The only question involved is basically one of fact, viz.: did the services rendered by the petitioner *substantially affect the safety of operation* of the respondent's motor vehicles used by it as a common carrier of freight in Interstate Commerce?

ARGUMENT.

I.

(a) The Interstate Commerce Commission Has Exclusive Power to Establish Qualifications and Maximum Hours of Service Pursuant to the Provisions of Section 204 of the Motor Carrier Act of 1935.

(b) The Appellate Court of Illinois Rightly Held and the Supreme Court of Illinois Rightly Affirmed That the Petitioner is Included Within the Class of Employees Who Are Specifically Exempted From the Operation of the Fair Labor Standards Act of 1938, But Are Under the jurisdiction of the Interstate Commerce Commission.

The petitioner based his suit on the provisions of Section 7 of the Fair Labor Standards Act of 1938.

Section 13 of said Act, however, provides that employees with reference to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service shall be exempted from the provisions thereof.

U. S. Code Ann. Title 49, Section 304: defining the power and duties of the Interstate Commerce Commission, reads:

> "(a) *Powers* and duties generally. It shall be the duty of the Commission—
>
> (1) To regulate common carriers by motor vehicle * * * may establish reasonable requirements with respect to * * * qualifications and *maximum hours of service of employees, and safety of operation and equipment.*" (Emphasis supplied.)

That this power, whether exercised or not, has existed

in the Interstate Commerce Commission since the enactment of the Motor Carrier Act of 1935 is now firmly established. *Southland Company* v. *Bailey*, 319 U. S. 44.

This Court, interpreting and delimiting the respective provisions of the Motor Carrier Act of 1935 and of the Fair Labor Standards Act of 1938, in *U. S.* v. *American Trucking Associations*, 310 U. S. 534 at page 553 said:

> "Our conclusion, in view of the circumstances set out in this opinion, is the meaning of employees in Section 204 (a) (1) and (2) is limited to those employees *whose activities affect the safety of operation.*" (Emphasis supplied.)

Shortly after the last quoted decision of this Court, the Interstate Commerce Commission held lengthy hearings, and rendered an opinion and report, *Ex Parte No. M C 2*, 28 Motor Carrier Cases, 125 (Interstate Commerce Commission Reports).

In said report the Commission, with particular reference to loaders, said at page 133:

> "The large carriers, however, and particularly those who have important operations from terminal to terminal, employ *men variously called loaders, dockmen or helpers, and hereinafter called loaders*, whose sole duties are to *load and unload* motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse.
>
> The evidence makes it entirely clear that *a motor vehicle must be properly loaded to be safely operated on the highways of the country.*" (Emphasis supplied.)

The Commission further in this report, under the heading of "Findings of Facts", said at page 139:

> "2. That *loaders, as above defined*, employed by common and contract carriers and private carriers of property by motor vehicle subject to part II of the Interstate Commerce Act *devote a large part of their*

time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce." (Emphasis supplied.)

The Commission further in this report, under the heading of "Conclusions of Law," said at page 139:

"2. That *our jurisdiction* to prescribe qualifications and maximum hours of service for employees of common and contract carriers and private carriers of property by motor vehicle *is limited to those employees who devote a substantial part of their time to activities which directly affect the safety of operation* of motor vehicles in the transportation of passengers or property in interstate or foreign commerce.

3. That *we have power*, under section 204 (a) of said part II, *to establish* qualifications and *maximum hours of service* for the classes of employees covered by findings of fact numbered 1, 2 and 3 above, and that we have no such power over any other classes of employees, except drivers." (Emphasis supplied.)

It has been unanimously held by District Courts that employees whose duties substantially affect the safety of operations come exclusively under the jurisdiction of the Interstate Commerce Commission and are excluded from the provisions of the Fair Labor Standards Act of 1938.

In *Crean* v. *Moran Transportation Co.*, 57 Fed. Supp. 212, it was held that:

"By substantial is not meant a majority of the time." Citing *Ex Parte* No. M. C. 2, 28 M. C. C. 125 and *Kasofsky* v. *Champion Trucking Co., Inc.*, 181 Misc. 470, 473.

See also:

Tinerella, et al. v. *Des Moines Transp. Co., Inc.*, 41 Fed. Supp. 798.

Robbins v. *Zabarsky, et al.*, 44 Fed. Supp. 867.

Bechtel v. *Stillwater Milling Co.*, 33 Fed. Supp. 1010.

West v. *Smoky Mountains Stages, Inc.*, 40 Fed. Supp. 296.

Magann v. *Long's Baggage Transfer Co., Inc.*, 39 Fed. Supp. 742.

Faulkner v. *Little Rock Furniture Mfg. Co.*, 32 Fed. Supp. 590.

Whether or not the duties performed by the petitioner substantially affected safety of operations is purely a question of fact.

The Appellate Court, reviewing the evidence presented at the trial of the case, and the findings of the trial court came to the conclusion that the services rendered by petitioner substantially affected the safety of operation of respondent's motor vehicles; that he was, accordingly, exempt from the provisions of section 7 of the Fair Labor Standards Act, but that control of his qualifications and maximum hours of service was exclusively within the jurisdiction of the Interstate Commerce Commission.

The Appellate Court said:

> "There is no question that some part of plaintiff's work week was devoted to the direction and supervision of the loading of interstate motor freight carriers. There is no question either that the loaders in his gang were exempted from Section 7 of the Fair Labor Standards Act. *We think, therefore, that with greater force, plaintiff comes within the exemption for, if the loaders are exempt because the manner in which they work affects the safety of the operation of defendant's motor vehicles, certainly the duties of plaintiff, who planned and directed the loading, affect that safety.* Considering the purpose of the Motor Carriers Act, we believe that the true determinant is whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial." (Petn. 23.) (Emphasis supplied.)

The Supreme Court of Illinois in affirming the judgment of the Appellate Court in this case, said:

> "* * * under the *facts* as found by the court, the employee came within the same exemption as loaders, dockmen and helpers.
>
> *For the reason aforesaid*, the judgment of the Appellate Court is affirmed." (R. 64.) (Emphasis supplied.)

In view of the specific finding by this court in *U. S. v. American Trucking Ass'n*, 310 U. S. 534 and of the *Interstate Commerce Commission in Ex Parte No. M. C. 2*, 28 Motor Carrier Cases 125, that the Interstate Commerce Commission has exclusive jurisdiction to determine maximum hours of loaders, the statement of petitioner at page 6 of his petition that "The Appellate Court was without authority in holding that the loaders of plaintiff's gang were exempt from section 7 and that, therefore, with greater force he came within the exemption" is untenable and entirely inconsistent with the law as established.

II.

Under the Statutes of Illinois, the Appellate Court has Power and Authority to Make a Final Determination of a Case Different from that of the Trial Court, where a Trial was had without a Jury. Findings of Fact by the Appellate Court may not, Under the Illinois Practice, be Reviewed by the Illinois Supreme Court in a Case at Law.

Chap. 110 Sec. 213 Smith-Hurd Illinois Statutes (Sec. 89 Civil Practice Act) provides:

> "If any final determination of any cause or proceeding tried without a jury, except as to equitable issues, shall be made by the Appellate Court, as the result wholly or in part of the finding of the facts, concerning the matter in controversy, different from the

finding of the court from which such cause or proceeding was brought by appeal, it shall be the duty of such Appellate Court to indicate in its opinion or in its final order, judgment or decree, the facts as found; and the statement of such facts by the Appellate Court shall be final and conclusive as to all matters of fact in controversy in such cause or proceeding. If the facts found by the Appellate Court sufficiently appear in the opinion or in the final order, judgment or decree, or from an examination of the two, no such final order, judgment or decree shall be reversed for failure to recite such facts. (1933, June 23, Laws 1933, p. 784, art. 8, Sec. 89.)"

Chap. 110, Sec. 216, Smith-Hurd Illinois Statutes (Sec. 92 (3) (b) of Illinois Civil Practice Act) reads as follows:

"Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall reexamine cases brought to it by appeal from the Appellate Courts, as to questions of law only."

In *Hadley* v. *Union Trust & Savings Bank*, 308 Ill. 175, at page 181, the Supreme Court of Illinois stated:

"The finding of the Appellate Court of a question of ultimate fact derived from a consideration of evidentiary facts, though requiring the application of principles of law to the consideration of the evidence, is a finding upon a mixed question of law and fact, which is final. (*Navratel* v *Curtis Door and Sash Co.*, 290 Ill. 526.) *We are prohibited by law from allowing any assignments of error calling in question the determination of such a question of fact by the Appellate Court.*" (Emphasis supplied.)

See also:

Ebbert v. *Metropolitan Life Insurance Co.*, 369 Ill. 306 at p. 310.

Shannon v. Nightingale, 321 Ill. 168.
McGoorney v. *Melrose Park*, 241 Ill. 142.
Roemheld v. *City of Chicago*, 231 Ill. 467.

The Supreme Court of Illinois has held that it is not concerned with the reasons assigned by the Appellate Court for its judgment.

In the recent case of *Merlo* v. *Public Service Co.*, 381 Ill. 300, at 321, it succinctly announced the limits of its inquiry as follows:

> "The inquiry of this court in cases appealed from the Appellate Court can only be whether there was error committed in rendering the judgment complained of. In actions at law this inquiry is confined to errors of law. While this court will examine the opinion of the Appellate Court to determine whether that court predicated its judgments solely on an erroneous conception of law, *what that court may assign as reasons for its judgment is not a matter of concern here.* Our duty is to determine the correctness of the judgment reviewed." (Emphasis supplied.)

The fact that a certificate of importance was granted does not have the effect of enlarging the scope of the inquiry which that Court is permitted to make. In *Stevenson* v. *Earling*, 290 Ill. 565, where the case was tried without a jury, the Appellate Court reversed, and granted a certificate of importance. In its opinion, at page 568, the Supreme Court of Illinois, said:

> "The finding of an ultimate fact is a conclusion of fact drawn from evidentiary facts, and the application of legal principles may be required to reach such conclusion, thereby making the question a mixed one of law and fact. Findings by the Appellate Court on mixed questions of law and fact are binding on this court." (Citing cases.)

III.

No Question of Due Process of Law Is Involved.

Petitioner concludes his summary statement with the comment: "Thus the petitioner was deprived of the judgment without due process law," etc. (Petn. 4.)

The grounds for such assertion are not stated.

All judgments of *nisi prius* courts are subject to appeal.

Respondent, within its rights, appealed from the judgment of the Municipal Court, which was thereupon reversed by the Appellate Court. The petitioner, within his rights, thereupon appealed from the judgment of the Appellate Court to the Supreme Court of Illinois which Court affirmed the judgment of the Appellate Court. All of this was done in accordance with the statutes, laws, and established practice of the State of Illinois.

Nowhere in the proceedings below did the petitioner raise the question of due process of law.

Such question, therefore, may not be raised here for the first time.

Hulbert v. *Chicago*, 202 U. S. 275.

Pennsylvania Railroad Co. v. *Ill. Brick Co.*, 297 U. S. 447, 462, 463.

IV.

No Important Question of Law Is Here Involved.

The entire matter involved herein is one of fact.

This court has repeatedly announced that "the application of the Act depends upon the character of the employee's activities."

Overstreet v. *North Shore Corporation*, 318 U. S. 125, 132.

Kirschbaum v. *Walling*, 316 U. S. 517.

This Court does not grant a certiorari to review evidence and discuss specific facts.

United States v. *Johnston*, 268 U. S. 220, 227.

Texas & New Orleans Railroad Co. v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 558.

Washington Securities Co. v. *United States*, 234 U. S. 76, 78.

Conclusion.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari, and that the petition for such writ should be denied.

Respectfully submitted,

HARRY J. LURIE,
JOSEPH L. GOLDEN,
MAURICE P. GOLDEN,
DAVID AXELROD,
Counsel for Respondent.

ROLAND RICE,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 139 22

MAX LEVINSON,

Petitioner,

vs.

SPECTOR MOTOR SERVICE, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT.

HARRY J. LURIE,
JOSEPH L. GOLDEN,
MAURICE P. GOLDEN,
DAVID AXELROD,
39 S. La Salle Street,
Chicago, Illinois,
Counsel for Respondent.

ROLAND RICE,
Of Counsel.
1424 16th St., N. W.,
Washington 6, D. C.

THE DARNELL CORPORATION, LTD., 350 WEST JACKSON, CHICAGO

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I. The record shows that the petitioner devoted the major portion of his work week to performing duties which substantially and directly affected the safety of operation of motor vehicles used in Interstate Commerce. Pursuant to the provisions of Section 204 of the Motor Carriers Act of 1935 the Interstate Commerce Commission has exclusive jurisdiction to establish qualifications and his maximum hours of service. He is, accordingly, specifically exempted from the provisions of the Fair Labor Standards Act.

II. The judgment of the Supreme Court of Illinois is based upon the finding of ultimate fact, disclosed by the record, that by reason of the nature and scope of the work performed by the petitioner, his duties substantially affected the safety of operation of respondent's motor vehicles in Interstate Commerce. To that determinative fact, the Supreme Court of Illinois applied the holdings of the Interstate Commerce Commission, as confirmed by this court, to the effect that such employees are exempt from the provisions of the Fair Labor Standards Act.

III. No question of due process of law is involved.

IV. No important question of law is involved.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 139.

MAX LEVINSON,

Petitioner,

vs.

SPECTOR MOTOR SERVICE, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Appellate Court of Illinois is reported in 323 Ill. App. 505. The opinion of the Supreme Court of Illinois is reported in 389 Ill. 466. (Advance sheets, 389 Ill. No. 6.)

Jurisdiction.

Petitioner invoked the jurisdiction of this Court under Rule 38, Paragraph 5(2) of this Court, and Section 1, Amendment XIV of the United States Constitution.

Petitioner has expanded his "Statement With Respect to Jurisdiction" into an argumentative attack on the judgment of the Appellate and Supreme Courts of Illinois. We reserve our comment for our argument.

The Question Presented.

Did the services rendered by the petitioner, as the same appear from the record in this case, substantially affect the safety of operation of the respondent's motor vehicles used by it as a common carrier of freight in interstate commerce? Stated otherwise: Did said services place petitioner within the classification of a "loader", as determined by the Interstate Commerce Commission in *ex parte* M. C. 2, 28 M. C. C. 125, and make him subject to the Commission's exclusive power to establish qualifications and maximum hours applicable to employees of his class?

The Statutes Involved.

The pertinent provisions of the Motor Carrier Act of 1935, and of the Fair Labor Standards Act of 1938, and of the Illinois Civil Practice Act are set forth in the appendix, *infra*, at pages 31 and 32.

Statement of the Case.

Petitioner's counsel has failed to make a fair statement of the case. After reciting the pleadings he sets forth, at pages 9 and 10 of his brief, such selected portions of petitioner's own testimony as he considers sufficient to support his contention, but omits substantial portions of petitioner's own admissions made on cross-examination, and totally fails to mention or refer to the testimony of any of the witnesses who appeared on behalf of the respondent.

A similar lack of fairness and candor was exhibited by the petitioner in his appeal to the Supreme Court of Illinois, where he failed to include pertinent testimony in his abstract of record, and it was necessary for the respondent to file an additional abstract in said Court. (R. 31-40.)

Accordingly, we submit the following synopsis as the respondent's statement of the case.

During the entire period of petitioner's employment, which is here involved, the petitioner acted as a dock foreman or superintendent of loaders and dockmen. The major portion of his time was spent in loading and unloading, and in supervising men working under him in loading and unloading trucks for the transportation of freight in interstate commerce. That was his principal duty, and that such work directly affected the safety of operations of respondent's trucks appears from the testimony of all of the witnesses, including that of the petitioner.

Petitioner, on cross-examination, testified that he worked in both the outbound and the inbound division; quite a few men, three or four gangs, each consisting of three or sometimes four men, were directly responsible to him. They all loaded and unloaded freight in the entire operation. (R. 13.) The men that he was in charge of did nothing else but handle, load, unload, check and stack freight. He saw that things should go right and if any man did something wrong he tried his best to correct him and showed him the proper and easier way to do it. (R. 14.) That as a foreman, it was his duty to supervise the men; that he was head man on the dock; that he had charge of that entire place (R. 35), that about thirty or forty per cent of his time was taken in loading, and the other sixty per cent was in supervising the men, checking, etc.; that he was in direct charge of all the men who loaded and unloaded vehicles during the hours which he spent at the terminal or dock. (R. 36.)

The respondent's several witnesses testified that the petitioner would instruct the men as to the proper procedure for loading, where to put cargo in the truck which would result in the equipment moving safely over the road; that there was loading of both inbound and outbound equipment

during the day (R. 37); that practically all day, as well as during the night, there was as much inbound freight as there was outbound (R. 38); that petitioner supervised the loading and the unloading, saw to it that the load was properly stacked and packed so that it would ride safely; that as a checker who is the head of the gang loading trucks, his main job is to see that the load is properly stacked and he is responsible for seeing that the load rides safely on the highway. (R. 38, 39.)

The trial court made a finding of facts and law in favor of the petitioner, including a finding that his work, or the major portion thereof, did not affect the safety of defendant's operations within the meaning of Section 13(b) of the Fair Labor Standards Act of 1938, and that petitioner was not exempt by virtue of said section. (R. 48.)

On appeal by the respondent to the Appellate Court of Illinois, that Court held that "there was no question that the loaders in his gang were exempted from Section 7 of the Fair Labor Standards Act because of the manner in which their work affected the safety of the operation of defendant's motor vehicles and that the duties of plaintiff, who planned and directed the loading, affected that safety." (R. 49.)

The Appellate Court reversed and remanded the cause with directions to enter judgment for costs in favor of the respondent (defendant) and against the petitioner (plaintiff). (R. 27.)

Decision of the Supreme Court of Illinois.

On appeal by the petitioner to the Supreme Court of Illinois, that Court, after analyzing the cases interpreting and construing the Motor Carrier Act as to employees coming thereunder by reason of their employment affecting safety of operations, stated that it was "of the opinion that the true determinant is not whether an employee performs any duties which substantially affect the safety of operations, but whether the duties affecting the safety are substantial." (R. 50-51.)

The basis of the affirmance by the Supreme Court of Illinois of the judgment of the Appellate Court is tersely stated thus: "We think the question of fact to be properly determined in this case is whether or not a substantial part of plaintiff's work affects the safety of operation of motor vehicles, and that this question of fact controls the case." (R. 51.)

The Court concluded its opinion by saying:

> "The Appellate Court may be in error in the reasons given for its judgment, but, under the facts as found by the court, the employee came within the same exemption as loaders, dockmen and helpers.
>
> For the reason aforesaid, the judgment of the Appellate Court is affirmed." (R. 52.)

SUMMARY OF ARGUMENT.

I. The record shows that the petitioner devoted the major portion of his work week to performing duties which substantially and directly affected the safety of operation of motor vehicles used in Interstate Commerce. Pursuant to the provisions of Section 204 of the Motor Carriers Act of 1935 the Interstate Commerce Commission has exclusive jurisdiction to establish qualifications and his maximum hours of service. He is, accordingly, specifically exempted from the provisions of the Fair Labor Standards Act.

II. The judgment of the Supreme Court of Illinois is based upon the finding of ultimate fact, disclosed by the record, that by reason of the nature and scope of the work performed by the petitioner, his duties substantially affected the safety of operation of respondent's motor vehicles in Interstate Commerce. To that determinative fact, the Supreme Court of Illinois applied the holdings of the Interstate Commerce Commission, as confirmed by this court, to the effect that such employees are exempt from the provisions of the Fair Labor Standards Act.

III. No question of due process of law is involved.

IV. No important question of law is involved.

ARGUMENT.

I.

The Record Shows That the Petitioner Devoted the Major Portion of His Work Week to Performing Duties Which Substantially and Directly Affected the Safety of Operation of Motor Vehicles Used in Interstate Commerce. Pursuant to the Provisions of Section 204 of the Motor Carriers Act of 1935 the Interstate Commerce Commission Has Exclusive Jurisdiction to Establish Qualifications and His Maximum Hours of Service. He Is, Accordingly, Specifically Exempted From the Provisions of the Fair Labor Standards Act.

The petitioner based his suit on the provisions of the Fair Labor Standards Act of 1938, particularly Section 207 thereof. (Appendix 31.) Section 213 of said Act, however, provides that employees with reference to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service shall be exempt from the provisions thereof. (Appendix 31.)

The Interstate Commerce Commission has exclusive power to regulate the maximum hours of service of certain employees by virtue of the provisions of the Motor Carrier Act of 1935. (Appendix 31.)

This Court, interpreting the respective provisions of the Motor Carrier Act of 1935 and of the Fair Labor Standards Act of 1938, in *U. S.* v. *American Trucking Associations*, 310 U. S. 534, at page 553 said:

> "Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in Section 204 (a) (1) and (2) *is limited to those employees whose activities affect that safety of operation.*" (Emphasis supplied.)

Shortly after the above decision, the Interstate Commerce Commission rendered an opinion and report in volume 28, Motor Carrier Cases, reading in parts as follows, at page 126:

> "By the Commission:
>
> The sole question presented for our decision at this time is the determination of *which employees* of common or contract carriers and private carriers of property by motor vehicle, if any, *other than drivers, perform duties which affect the safety of operation and are therefore subject to the authority conferred on us* by section 204 (a) (1), (2), and (3) of part II (formerly cited as the Motor Carrier Act, 1935) of the Interstate Commerce Act to prescribe qualifications and maximum hours of service. *The importance of this question is emphasized by the fact that section* 13 (b) (1) *of the Fair Labor Standards Act exempts from the overtime provisions of section* 7 *thereof any employee with respect to whom we have power to establish qualifications and maximum hours of service* pursuant to the provisions of said section 204. Before the Wage and Hour Division of the Department of Labor, which administers the provisions of the Fair Labor Standards Act, or the common, contract, and private carriers can well determine which employees are subject to the provisions of section 7 of that act, *they must know the extent of our jurisdiction.*" (Emphasis supplied.)

At page 128, the Commission quoted from its report in *re Jurisdiction Over Employees of Motor Carriers*, 13 M. C. C. 481 at page 488, as follows:

> "For the reasons stated we conclude that our power under section 204 (a) (1) and (2) is limited to prescribing qualifications and maximum hours of service for those employees of common and contract carriers whose activities affect the safety of operation of motor vehicles engaged in transporting passengers and property in interstate and foreign commerce, and for the purpose of promoting such safety of operation." (Emphasis supplied.)

The Commission, continuing its report in 28 M. C. C., further stated at page 131:

> "There are other decisions of similar import, and, as a result of our study of them and of the Supreme Court's decision in *United States* v. *American Trucking Assns., Inc., supra,* we have concluded that *we should not assert jurisdiction as to employees who spend an unsubstantial part of their time* in performing duties which affect the safety of operation of motor vehicles. *We therefore* conclude that under said section 204 (a) we have *power to establish qualifications and maximum hours* of service with respect only to *employees who devote a substantial part of their time to activities* which *directly affect safety of operation.* Our task is thus narrowed to determining which employees of common and contract carriers and of private carriers of property by motor vehicle, engaged in interstate or foreign commerce, fall within that category." (Emphasis supplied.)

The Commission then reviewed the evidence presented to it by all interested parties, and in commenting thereon said at page 132:

> "The record in this proceeding discloses that the employees engaged in *preparing the motor vehicles for operation on the highways* and in the actual operation thereof fall into five principal classes, as follows: (1) Mechanics and other garage workers; (2) *loaders;* (3) dispatchers; (4) drivers; and (5) helpers." (Emphasis supplied.)

The Commission, with particular reference to loaders, said at page 133:

> "The large carriers, however, and particularly those who have important operations from terminal to terminal, employ *men variously called loaders, dockmen, or helpers,* and *hereinafter called loaders,* whose sole duties are to *load and unload* motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse.

The evidence makes it entirely clear that *a motor vehicle must be properly loaded to be safely operated on the highways* of the country. If more weight is placed on one side of the vehicle than on the other, there is a tendency to tip when rounding curves. If more weight is placed in the rear of the vehicle, the tendency is to raise the front wheels and make safe operation difficult. Further, it is necessary that the load be distributed properly over the axles of the motor vehicle. • • •

Evidence concerning the necessity for proper loading was submitted not only by the carriers but by representatives of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, the union to which organized loaders belong. *There was no conflicting evidence on this point. We conclude that loaders devote a large part of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate or foreign commerce, and hence that we have power to establish qualifications and maximum hours of service for such employees under said section* 204 (a)."

The Commission further in this report under the heading of "Findings of Facts" said at page 139:

"2. That *loaders, as* above *defined,* employed by common and contract carriers and private carriers of property by motor vehicle subject to part II of the Interstate Commerce Act *devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce.*"

The Commission further in this report under the heading of "Conclusions of Law" said at page 139:

"2. That *our jurisdiction* to prescribe qualifications and maximum hours of service for employees of common and contract carriers and private carriers of property by motor vehicle *is limited to those employees who devote a substantial part of their time to activities*

which directly affect the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce.

3. That *we have power*, under section 204 (a) of said part II, *to establish* qualifications and *maximum hours of service* for the classes of employees covered by findings of fact numbered 1, 2, and 3 above, and that we have no such power over any other classes of employees, except drivers." (Emphasis supplied.)

The mere fact that the Interstate Commerce Commission has not exercised its jurisdiction with reference to employees over whom it has *power* to make regulations is immaterial. That this power, whether exercised or not, has existed in the Interstate Commerce Commission since the enactment of the Motor Carrier Act of 1935 is now firmly established. *Southland Company* v. *Bailey*, 319 U. S. 44. That this principle was generally recognized is evidenced by the following United States District Court decisions:

In *Bechtel* v. *Stillwater Milling Co.*, 33 Fed. Supp. 1010, the court made use of the following language at page 1014:

"(3) This court, therefore, is of the opinion that the *power* granted to the Interstate Commerce Commission *is an exclusive power* and *by the exemption in the Fair Labor Standards Act, Congress meant to recognize the power that had been granted to the Interstate Commerce Commission.*" (Emphasis supplied.)

In *Robbins* v. *Zabarsky*, 44 Fed. Supp., page 867, the court said at page 870:

"If the Interstate Commerce Commission has the *power* to fix maximum hours for a given employee, the Fair Labor Standards Act is not applicable to him, *regardless of whether or not the Commission has exercised the power.* That is the plain language of Section 13 (b) (1) and the construction by the courts

has followed it: *West* v. *Smoky Mountains Stages, Inc., supra; Magann* v. *Long's Baggage Transfer Co., Inc.*, D. C., 39 F. Supp. 742." (Emphasis supplied.)

In *Faulkner* v. *Little Rock Furniture Mfg. Co.*, 32 Fed. Supp., page 590, the court expressed itself as follows, at page 592:

> "I therefore conclude • • •
>
> • • • That the Interstate Commerce Commission has *power* to fix maximum hours of service 'if need is found', and if they have not done so *no power is reserved or delegated to the Administrator of the Fair Labor Standards division of the Department of Labor to do so*, and the employees acquire no rights under the Fair Labor Standards Act of 1938.
>
> Therefore the plaintiff cannot recover, and this action under the maximum hours section of the Fair Labor Standards Act of 1938 must be and is dismissed." (Emphasis supplied.)

In a parallel case with facts almost identical with the one under consideration here, Judge Holly of the District Court of the United States, for the Northern District of Illinois, in *Tinerella, et al.* v. *Des Moines Transp. Co., Inc.*, 41 Fed. Supp. 798, at page 799, said:

> "Plaintiff's employment (except that of one plaintiff, Ray Chase) consisted of *loading and unloading* the defendant's truck of cargo merchandise, freight and commodities. Since the decision of the Supreme Court in American Trucking Associations, Inc., the Interstate Commerce Commission, after a hearing participated in by the employers, labor unions and associations, entered a formal order finding that *loaders and helpers perform duties which materially affect the safety of operation of motor vehicles in interstate commerce, devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate commerce* and

that the Commission has *power* to establish qualifications and maximum hours of service of such employees."

Accordingly Judge Holly held, at page 800:

"(4) In my opinion plaintiffs herein do not come under the Fair Labor Standards Act so far as their hours of labor are concerned." (Emphasis supplied.)

Whether the petitioner himself did the physical work of loading or was a foreman of loaders or a supervisor of loaders, is of no significance. In *Robbins* v. *Zabarsky, et al.*, 44 Fed. Supp. 867, the court said, at page 869:

"The complaint states he was employed as 'a mechanic to repair and service the trucks and equipment of the defendants' and 'as a *foreman to superintend and direct* other mechanics who repaired and serviced the trucks and equipment of the defendants.' I believe that in such capacity it is clear that his duties would be such that *the safety of the defendants' operations would be affected by* his manner of performing them. Such essentials as adequate brakes and proper electrical equipment would be his responsibility. *Carelessness on his part, either in performance or in supervising performance of service* and repair jobs, *might result in the creation of great hazards* in the operation of the vehicles." (Emphasis supplied.)

The petitioner cites to support his position the case of *Overnight Motor Transportation Company* v. *Missel*, 316 U. S. page 572. The facts in that case are diametrically opposed to the facts in the case at bar. The court in rendering its decision in the above case said:

"Respondent, Missel, was an employee of the petitioner, Overnight Motor Transportation Company, a corporation engaged in interstate motor transportation as a common carrier. HE ACTED AS RATE CLERK AND PERFORMED OTHER INCIDENTAL DUTIES, NONE OF WHICH WERE CONNECTED WITH SAFETY OF OPERATION." (Emphasis supplied.)

The petitioner cites the case of *Anuchik, et al.* v. *Trans-American Freight Lines, Inc.*, C. C. H. Labor Law Service 61,245. A reading of this case leads us to believe that a thorough analysis thereof was not made by the petitioner. That case was brought by the following workers: tarpaulin worker, porter, pickup driver, loader, stockroom boy, and night watchman. The court found that the defendant in that case *as to all those workers except the pickup driver,* was actually *engaged in the business of manufacturing* and remodeling trucks and tractors, having gone so far as to apply to the State of Michigan for a *manufacturer's* license plates, and therefore, would not allow the defendant to claim that it was in the manufacturing business at one time and then claim for other purposes it was not. The court said:

> "This court acknowledges that this is a close question but reviewing all the testimony it is our opinion that here again the work done can be divided into what can be regarded as 'safety of operation' and what not. To begin with the evidence shows that whenever a Gotfredson tractor was rebuilt by these plaintiffs defendant got a *manufacturer's* license plate for the new job to take it to its points of destination. Under Section 4639 C. L. Michigan 1929, this has been interpreted to mean that the motor vehicles bearing those plates were *'just manufactured.'* See *People* v. *Wirth*, 218 Mich. 493. Defendant also used these *'manufacturer's plates'* in connection with pick-up trucks and Ford tractors. It will be therefore apparent that *defendant itself looked upon these as manufactured goods* and under *U. S.* v. *Armature Exchange, Inc., supra,* a case interpreting a federal statute, *defendant was certainly 'manufacturing.'* Defendant should not be permitted to blow hot and cold, taking advantage of one law to be *in the manufacturing business* and another one not to be. Here the question of manufacturing or 'building' is more determinative than in Case No. 2830." (Emphasis supplied.)

The court *made no determination* as to the pick-up driver, *the only employee who was directly connected with safety of operation, because* no testimony was presented with reference to him, and the court left its decision open as to him until the matter was either settled or evidence presented.

The petitioner made a studied attempt, by designating himself a "checker," to escape the all important fact that his major and most important duties concerned themselves with safety of operation.

The petitioner, to emphasize his point that he was a "checker", and therefore was included within provisions of Section 7 of the Fair Labor Standards Act of 1938, cited *McKeown* v. *Southern California Freight Forwarders, et al.*, 61521 C. C. H. Labor Law Service. The court found in that case as follows:

> "The principal work of the plaintiff was that of a checker employed by the defendant. Goods which were *unloaded* on the platform were checked by the plaintiff and at times, *but infrequently*, he assisted in placing the goods in a truck which transported them to their destination, or in a bin." (Emphasis supplied.)

The findings of fact in the above case are also diametrically opposed to the undisputed facts in the case at bar.

The record clearly discloses that the petitioner was either *a loader, foreman, or supervisor of loaders during the entire period for which he claims.* Regardless of the title or name given to his duties for the period involved, *a substantial part* of his duties, and a *substantial and major part* of the actual work done by him and by the employees immediately under his supervision and control, *directly affected the safety of operation.*

An examination of the petitioner's own testimony makes that conclusion inescapable. His testimony is as follows:

"During the day I was in charge of every man on

the dock, except the men who were superior to me. The only man superior to me on the dock was Jack Levinson." (R. 36.) * * * "As foreman, I said my duty was to supervise the men." (R. 35.) * * * *"These men that I was in charge of did nothing else but handle, load, unload, check and stack freight."* (R. 14.) * * * "I was in direct charge of all men who *loaded and unloaded vehicles during the hours which I spent at the terminal or dock."* (R. 36.) * * * "I was the head man on the dock. If I saw a man coming in who was drunk, it was part of my duty not to let him work that day." (R. 13.) * * * "I watched all that. While I was there, trucks, either Spector trucks, lease operators or interline carriers were *loaded to go over the road."* (R. 13.) To a certain extent, a checker watches the loading of trucks and the distribution of the weight in the truck. * * * "The *checker* is at the head of a gang *loading* a truck." * * * I supervised these checkers and also acted as checker." (R. 35.)

The uncontradicted testimony of the respondent's witnesses clearly shows that not only a *substantial part,* but a major part of the plaintiff's time was spent in work *directly affecting safety of operations.* We quote as follows from the testimony of the respondent's witness, TED JARVIS:

"He worked nights when I worked nights, and I worked days when he worked days also." (R. 38.) "During the period he acted as foreman, he would give the gang the bills, tell them to load certain trailers or trucks, whichever the bills were marked for, after the city dispatcher had routed them in the different sections of the city. *He also told them with reference to loading of city and out of town trucks. He supervised the loading and unloading, seeing to it that the load was properly stacked and packed so that it would ride safely."* (R. 20, 21; 38, 39.)

JACK LEVINSON, one of the witnesses for the respondent, testified as follows:

> • • • "He would instruct the men the proper procedure for loading, where to put it in the truck which would result in *the equipment moving safely over the road* if it were over the road equipment, or at the speed which a local delivery driver might affect his actual deliveries in the city." (R. 37.)

SAM FISHMAN, another witness for the respondent, testified as follows:

> "Beginning October, 1940, his position was changed, he got to be boss. He was directing the work on the dock for a couple of months. I do not know exactly how long. *During the whole day he was telling us to load and unload* whatever was supposed to be done. That is all he told us. *He wanted us to load the trailers his way,* and break them down his way." (R. 22.)

WILLIAM A. PROKOP, another witness for the respondent, testified:

> "• • • I remained on his gang until he quit. I can't tell off-hand when that was. He was working directly with me on the gang, he was the boss. He was practically the boss of the whole dock at that time, dock foreman." (R. 24.) • • • "*A checker's duty is to see that the loads are properly loaded and checked out, and the goods taken in or given out, according to the bill of lading, and the loads properly loaded and unloaded.*" (R. 24.)

The handiwork of petitioner's counsel is easily discerned in the repeated attempts of the petitioner carefully and insistently to evade all references to *those duties with which he was charged as a loader or a supervisor of loaders.*

The length to which the petitioner went to avoid the fact that his duties concerned themselves principally, primarily and substantially with safety of operations can be seen by his omission of pertinent parts of the testimony in the Abstract of the Record filed by him in the Illinois Supreme Court. It became necessary for the respondent to file an additional Abstract of the Record.

We respectfully call the court's attention to those omissions, which are succinctly abstracted at pages 35 to 40 of the transcript of Record herein.

At page 20 of petitioner's brief reference is made to the Labor Administrator's interpretative bulletin No. 9 which suggests "the greater part of his time during any work week on non-exempt activities" as the gauge by which to determine the inclusion or exemption of any particular employee from the provisions of the Fair Labor Standards Act.

It is to be noted that the interpretative bulletins issued by the Labor Administrator are not issued as regulations under statutory authority of the Congress. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572 at 581. While the Courts generally have stated that bulletins of the Administrator are persuasive as expressions of those experienced in the administration of the act, such references by the Court have been to situations wherein the jurisdiction of the Labor Administrator is clear and definite. In view of the fact, however, that it has been determined beyond cavil or dispute that the Interstate Commerce Commission alone has the *power* to determine qualifications and maximum hours of service for employees engaged as loaders of motor vehicles used in interstate commerce, and that non-action by the Interstate Commerce Commission to define the words "a substantial part of their time" does not enlarge the jurisdiction of the Labor Administrator.

Whether or not the duties of a given employee *substantially* affect the safety of operation of motor vehicles engaged in interstate commerce is a question of fact, and in each instance, must be left to judicial determination. Were it otherwise, the Labor Administrator would be in a position to promulgate bulletins defining as "substantial", any percentage which he might wish, even to such an extent as to nullify the findings of the Interstate Commerce Commission. The ordinary and well understood meaning of the word "substantial" is "important" or "material".

We again emphasize the finding of fact and the conclusion of law made by the Interstate Commerce Commission in its report, 28 M. C. C. page 139, wherein the finding is made that loaders devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce, and their conclusion of law that the Commission's jurisdiction is limited to that class of employees.

In *Crean* v. *Moran Transportation Co.*, 57 Fed. Supp. 212, it was held that:

> "By substantial is not meant a majority of the time."

Historically, it is a fact that prior to the issuance of said bulletin No. 9 the measure adopted by the Labor Administrator required an employee to spend not less than eighty per cent (80%) of his time in any work week in the performance of services within the categories established by the Interstate Commerce Commission as affecting safety of operations. In this connection, the Circuit Court of Appeals for the Fifth Circuit, in the case of *Fleming* v. *A. H. Belo Corporation*, 121 Fed. (2) 207, in a suit instituted by the administrator of the Wage and Hour Division to enjoin the defendant from violating the Fair Labor Standards Act, aptly said, at pages 212-213:

> "The issue presented here by the claim of the ap-

pellant that though the statute does not say so, it must be construed to give full effect to the purpose of placing him as administrator of the act in a tutelary position, the employer and employee in a state of tutelage to him, so that they no longer have a right to fix their wages by agreement, but must fix them according to the legalistic interpretative formulas of the administrator's general counsel, brings this into sharpest focus. * * * legislation is compromise. * * * Its meaning may not be sought by the courts in the vague penumbrae of the wishes and desires of its proponents or its opponents as these are expressed in debates. Particularly, may it not be sought in the purely legal interpretation by the administrator's legal staff, for if this were so, the administrator would find himself, not only in the powerful position he properly stands in, of administrator for the Congress of one of its laws, as plaintiff bringing suit in the name and power of the United States to enforce the law, but, by issuing a binding interpretation of it before he brings his suit, in the position of a judge in his own cause who has written his decision before hand."

In 316 U. S. 624, this Court, in affirming the decision in the *Belo* case, criticized the Administrator's "time-off plan" which is explained in Interpretative Bulletin No. 4 (p. 633), and declined to provide a rigid definition of "regular rate" when Congress has failed to provide one, stating: "And that which it was unwise for Congress to do, this Court should not do." It may be said with greater force that if the Interstate Commerce Commission, which has exclusive jurisdiction to determine qualifications and maximum hours for loaders, has refrained from providing a rigid definition of "substantial," such omission does not shift the power to, nor should it be exercised by, the Administrator.

It is elementary that the *nature of the services rendered by an employee* determines whether he is subject to or exempt from the provisions of the Fair Labor Standards Act of 1938.

A review of the testimony of the petitioner and respondent's witnesses clearly shows that, regardless of the other fluctuating duties which the petitioner claims to have performed, the preponderating weight of evidence is that *during at least eight to ten hours of each working day; during the period here involved, he worked at, or supervised the loading and unloading of trucks used in interstate commerce—duties which directly affected safety of operations.*

The decision of the Appellate Court not only conforms to the overwhelming preponderance of the evidence in this case, but is in harmony with the petitioner's own testimony, some of which we quoted and referred to in our argument above, which *shows clearly that practically his only duties by his own admission were those of a foreman in charge of men whose sole and only duty was to handle, load and unload and stack freight, which was carried on trucks in interstate commerce.*

II.

The Judgment of The Supreme Court of Illinois is Based Upon the Finding of Ultimate Fact, Disclosed by the Record, That by Reason of the Nature and Scope of the Work Performed by the Petitioner, His Duties Substantially Affected the Safety of Operation of Respondent's Motor Vehicles in Interstate Commerce. To That Determinative Fact, The Supreme Court of Illinois Applied the Holdings of the Interstate Commerce Commission, as Confirmed by This Court, to the Effect That Such Employees are Exempt From the Provisions of the Fair Labor Standards Act.

Petitioner predicates his argument upon the assumption that the Municipal Court's finding to the effect that peti-

tioner's work did not affect safety of operation is unassailable.

That assumption is entirely erroneous.

It is familiar law that judgments of *nisi prius* courts are subject to review both as to findings of fact and rulings of law, and that there is no sanctity in the judgment of a trial court in any cause which may be reviewed on appeal. Particularly, it is the law of the State of Illinois that the Appellate Court has power and authority to make a final determination of a case different from that of the trial court, where trial was had without a jury. *Chapter 110, Section 213, Smith-Hurd Illinois Statutes (Section 89 Illinois Civil Practice Act).* (Appendix 32.) And it is further the law of Illinois that findings of fact by the Appellate Court may not be reviewed by the Illinois Supreme Court in such a case at law. *Chapter 110, Section 216, Smith-Hurd Illinois Revised Statutes (Section 92(3)(b) of Illinois Civil Practice Act).* (Appendix 32.)

Ebbert v. *Metropolitan Life Insurance Co.*, 369 Ill. 306, affords a complete answer to the contention made by the petitioner that the Appellate Court invaded the province of the trial court in disregarding the specific findings of the trial court. After quoting Section 92(3)(b) of the Civil Practice Act, the Illinois Supreme Court at page 310 makes use of the following language:

> "It is appellant's contention that, since the evidence was conflicting, it was the province of the trial judge to weigh the evidence, and that, by invading that province and reversing the judgment, the Appellate Court committed an error of law. However, this contention can not be sustained in view of the contrary language of section 89 of the Civil Practice act (Ill. Rev. Stat. 1937, chap. 110, par. 213), which is a revision of section 120 of the Practice act of 1907.

* * * * *

(Page 311):

In *Economy Fuse and Manf. Co.* v. *Standard Electric Manf. Co.*, 359 Ill. 504, a similar question was presented. The cause had been tried before a judge of the municipal court of Chicago, a jury trial having been waived. The Appellate Court reversed this judgment, finding the facts to be different than found by the municipal court judge. In affirming the judgment of the Appellate Court we said: 'This was a question of fact as to which the finding of the Appellate Court is binding upon this court if there be any evidence in the record tending to support such finding.' We announced the same rule in a large number of cases decided under former Practice acts." (Citing numerous cases.)

In the case of *Shannon* v. *Nightingale*, 321 Ill. 168, the principle governing a situation, such as presents itself in the case at bar, was stated thus at pages 172-173:

> "*Wherever evidence must be introduced to maintain an issue of fact made by the pleadings controverted questions of fact are involved, which include not only evidentiary facts but ultimate facts*, even though there be no conflict in the testimony or the evidence may be agreed upon and embodied in a stipulation of facts." (Citing numerous cases.)
>
> . . . . . .
>
> "*The determination of the question of ultimate facts* whether or not Pratt was an employee of the plaintiff's in error *involves a conclusion derived from a consideration of all these and other evidentiary facts, in connection with the application of principles of law to a consideration of the evidence. The question thus becomes a mixed question of law and fact, as to which the verdict of the jury and the decision of the Appellate Court are conclusive and not subject to review.*" (Citing numerous cases.) (Italics supplied.)

And again in *Hadley* v. *Union Trust & Savings Bank*,

308 Ill. 175, at page 181, the Illinois Supreme Court reiterated that

> "The finding of the Appellate Court of a question of ultimate fact derived from a consideration of evidentiary facts, though requiring the application of principles of law to the consideration of the evidence, is a finding upon a mixed question of law and fact, which is final. (*Navratil* v. *Curtis Door and Sash Co.*, 290 Ill. 526.) We are prohibited by law from allowing any assignments of error calling in question the determination of such a question of fact by the Appellate Court."

In *Roemheld* v. *City of Chicago*, 231 Ill. 467, the Supreme Court of Illinois said, at pp. 469-470:

> "It is also urged that the finding in the Appellate Court as to the facts is a mere recital of conclusions or opinions. It is true that *the finding of an ultimate fact is a statement of a conclusion, but it is a conclusion of fact from the various subsidiary or evidentiary facts tending to prove such ultimate fact. To reach the conclusion may require the application of legal principles so as to make the question a mixed one of law and fact,* such as the question whether uncontradicted testimony establishes the fact of an appointment of an agent, or that a certain act was the proximate cause of an injury, or that there was a waiver of a legal right or an estoppel to assert it. (*Meyer* v. *Butterbrodt*, 146 Ill. 131; *Moerschbaecher* v. *Supreme Council Royal League*, 188 id. 9.) The Appellate Court concluded that what was done by the commissioner of public works *amounted to an approval*, in writing of the set of working drawings, and an order, in writing, to do the work as shown thereon, *and this was a question of fact.*" (Italics supplied.)

In *McGovney* v. *Melrose Park*, 241 Ill. 142, the Illinois Supreme Court, at page 144, used the following language:

> "It is insisted by appellant that the finding of facts by the Appellate Court includes legal conclusions, and that therefore this court is not bound by such finding,

citing *Hogan* v. *Chicago and Alton Railroad Co.*, 202 Ill. 206, and *Martin* v. *Martin*, 202 id. 382. It may be true that the finding of ultimate facts by the Appellate Court includes conclusions, and that to reach these conclusions required the application of legal principles by that court; *but the most that can be said in favor of appellant's contention is*, that the questions whether he was appoined as village attorney, *whether all the services were within the sphere of his duties as village attorney* and whether the ordinance in question was in force *were mixed questions of law and fact, and the findings of the Appellate Court on questions of that character are conclusive on this court and may not be reviewed here.* (*Moerschbaecher* v. *Royal League*, 188 Ill. 9; *Roemheld* v. *City of Chicago*, 231 id. 467.) This being so, it is unnecessary for us to consider or decide the other questions raised in the briefs."

A reviewing court is not concerned with the reasons assigned by the lower court for its judgment.

In the recent case of *Merlo* v. *Public Service Co.*, 381 Ill. 300, at 321, the Illinois Supreme Court succinctly announced the limits of its inquiry as follows:

"The inquiry of this court in cases appealed from the Appellate Court can only be whether there was error committed in rendering the *judgment* complained of. In actions at law this inquiry is confined to errors of law. While this court will examine the opinion of the Appellate Court to determine whether that court predicated its judgments solely on an erroneous conception of law, *what that court may assign as reasons for its judgment is not a matter of concern here.* Our duty is to determine the correctness of the judgment reviewed." (Italics supplied.)

That principle was recognized by the Supreme Court of Illinois in the concluding words of its opinion in the instant case as follows:

"The Appellate Court may be in error in the reasons given for its judgment, but, under the facts as

found by the court, the employee came within the same exemption as loaders, dockmen and helpers.

For the reason aforesaid, the judgment of the Appellate Court is affirmed." (R. 52.)

The fact that a certificate of importance was granted does not have the effect of enlarging the scope of the inquiry which the Illinois Supreme Court is permitted to make. In *Stevenson* v. *Earling*, 290 Ill. 565, where the case was tried without a jury, the Appellate Court reversed, and granted a certificate of importance. In its opinion, at page 568, the Court said:

> "The finding of an ultimate fact is a conclusion of fact drawn from evidentiary facts, and the application of legal principles may be required to reach such conclusion, thereby making the question a mixed one of law and fact. Findings by the Appellate Court on mixed questions of law and fact are binding on this court." (Citing cases.)

The petitioner, in his summary of argument (Brief, p. 13) states that "a reviewing court's decision cannot be based on a guess or surmise". The Supreme Court of Illinois, in its opinion, refutes any such intimation, as appears from the following:

> "We have analyzed the cases as to the interpretation and construction to be given the Motor Carrier Act as to employees coming thereunder by reason of their employment affecting safety operations and are of the opinion that the true determinant is not whether an employee performs any duties which substantially affect the safety of operations, but whether the duties affecting the safety are substantial. This brings us to the question of the effect of the Appellate Court's decision.
>
> Plaintiff's contention is that the Appellate Court erred in disregarding the specific findings of the trial court that the major portion of plaintiff's duties did not affect safety of operation; that the findings of the court cannot be disregarded or disturbed unless against

the manifest weight of the evidence; that where the evidence is merely conflicting the Appellate tribunal should not substitute its judgment as to the credibility of witnesses for that of the jury or the trial court. Plaintiff, therefore, insists that this court reverse the judgment of the Appellate Court and affirm the findings and judgment of the trial court. We do not think the Appellate Court substituted its judgment, as to the credibility of witnesses, but only exercised its authority under section 89 of the Civil Practice Act, to make a final determination of the case different from that of the trial court. (Ill. Rev. Stat. 1943, chap. 110, par. [fol. 68] 213.) In nonjury cases, such as this, the Appellate Court may make findings of fact different from the findings of the trial court. * * * *Plaintiff's contention that this court should affirm the findings and judgment of the trial court in that respect is not tenable.*

Defendant contends the Appellate Court has exercised its statutory authority making final decision of the case and that the decision of the Appellate Court should therefore be affirmed. This presents the question as to whether or not the facts found by the Appellate Court sufficiently appear in the opinion or in the final judgment, or, from an examination of the two, to support the judgment as entered. *We think the question of fact to be properly determined in this case is whether or not a substantial part of plaintiff's work affects safety of operation of motor vehicles, and that this question of fact controls this case.* If it be determined from the evidentiary facts that plaintiff, in a substantial part of his work, was engaged in safety of operation of motor vehicles, or the cargo thereof, he would be exempted from the Fair Labor Standards Act, as a matter of law.

The Appellate Court found that the loaders in Appellant's gang were exempted from section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation." (Emphasis supplied.) (R. 50, 51, 52.)

It is clearly apparent that the Supreme Court of Illinois was satisfied from a consideration of the opinion of the Illinois Appellate Court and its judgment, that petitioner's duties substantially affected the safety of operation of the respondent's motor vehicles in interstate commerce.

The soundness of the reasoning of the Supreme Court of Illinois has been recognized and approved by the Circuit Court of Appeals for the Second Circuit in *Walling* v. *Comet Carriers*, ~~115~~ 151 F. (2) 107.

III.

No Question of Due Process of Law Is Involved.

Petitioner has apparently abandoned his contention that the reversal of the trial court's judgment deprived him of due process of law. It was not until after the Supreme Court of Illinois had decided the case that he made that bald assertion in his petition for rehearing (R. 60-61). He neither mentions said contention in his Specifications of Errors nor in his argument (Rule 27(6)).

Such question, therefore, may not be raised here for the first time.

Hulbert v. *Chicago*, 202 U. S. 275.

Pennsylvania Railroad Co. v. *Ill. Brick Co.*, 297 U. S. 447, 462, 463.

IV.

No Important Question of Law Is Involved.

It is submitted that the record clearly e 'ablishes that petitioner, as a "working foreman", not only actually performed the duties of a loader, but with the additional responsible duties of supervising all of the loaders on the dock, the substantial and major part of his work directly affected the safety of operation of respondent's motor vehi-

cles; that the Illinois Supreme Court did not attempt to broaden the jurisdiction of the Interstate Commerce Commission, because "loaders" constitute one of the specifically designated class of motor carrier employees who are exempt from the provisions of the Fair Labor Standards Act; that merely because petitioner chose to designate himself as a "checker", he was not thereby excluded from the class of exempted employees.

The entire matter involved herein is one of fact.

This court has repeatedly announced that "the application of the Act depends upon the character of the employee's activities."

Overstreet v. *North Shore Corporation*, 318 U. S. 125, 132.

Kirschbaum v. *Walling*, 316 U. S. 517.

Conclusion.

It is respectfully submitted that the petitioner has not shown any valid reason to disturb the judgment of the Supreme Court of Illinois; that said Court has correctly decided the issues presented and that its judgment should be affirmed.

Respectfully submitted,

HARRY J. LURIE,
JOSEPH L. GOLDEN,
MAURICE P. GOLDEN,
DAVID AXELROD,
39 S. La Salle Street,
Chicago, Illinois,
Counsel for Respondent.

ROLAND RICE,
Of Counsel.
1424 16th St., N. W.,
Washington 6, D. C.

APPENDIX.

The Fair Labor Standards Act of 1938, U. S. C. A., Title 29, provides as follows:

"SECTION 207. Maximum hours:

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

"SECTION 213. Exemptions:

(b) The provisions of Section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or (2) any employee of any employer subject to the provisions of sections 1-27 of Title 49."

Part II, Interstate Commerce Act, U. S. C. A., Title 49, Sec. 304 (formerly cited as the Motor Carrier Act of 1935, U. S. C. A., Title 49, Sec. 204) provides as follows:

"SECTION 304: Powers and duties of commission.

(a) Powers and duties generally. It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle

as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Chap. 110, Sec. 213, Smith-Hurd Illinois Statutes (Sec. 89 Civil Practice Act) provides:

"If any final determination of any cause or proceeding tried without a jury, except as to equitable issues, shall be made by the Appellate Court, as the result wholly or in part of the finding of the facts, concerning the matter in controversy, different from the finding of the court from which such cause or proceeding was brought by appeal, it shall be the duty of such Appellate Court to indicate in its opinion or in its final order, judgment or decree, the facts as found; and the statement of such facts by the Appellate Court shall be final and conclusive as to all matters of fact in controversy in such cause or proceeding. If the facts found by the Appellate Court sufficiently appear in the opinion or in the final order, judgment or decree, or from an examination of the two, no such final order, judgment or decree shall be reversed for failure to recite such facts. (1933, June 23, Laws 1933, p. 784, art. 8, Sec. 89.)"

Chap. 110, Sec. 216, Smith-Hurd Illinois Statutes (Sec. 92.(3) (b) of Illinois Civil Practice Act) provides:

"Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall reexamine cases brought to it by appeal from the Appellate Courts, as to questions of law only."

OCT 8 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 22

MAX LEVINSON, *Petitioner*,

v.

SPECTOR MOTOR SERVICE, A Corporation, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

HARRY J. LURIE,
JOSEPH L. GOLDEN,
MAURICE P. GOLDEN,
DAVID AXELROD,
39 S. La Salle Street,
Chicago, Illinois,

ROLAND RICE,
1424 16th Street, N. W.,
Washington, D. C.,
Counsel for Respondent.

PETER T. BEARDSLEY,
Of Counsel,
1424 16th St., N. W.,
Washington 6, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SUPPLEMENTAL BRIEF FOR RESPONDENT.

Introductory.

The filing of briefs amicus curiae by the Interstate Commerce Commission and the Solicitor General in this case and the positions taken by them urge upon us the necessity of submitting this supplemental brief. The brief of the Interstate Commerce Commission especially is construed as being helpful to respondents' position, but it also raises additional questions which we respectfully believe warrant our further comment.

I. The Interstate Commerce Commission, in an Unbroken Line of Decisions, Has Consistently Held that Its Safety Jurisdiction Extends to Classes of Employees of Interstate Motor Carriers and Its Interpretation Has Received the Tacit Approval of this Court.

Little can be added to the able argument set forth in the Commission's brief amicus curiae to the effect that its jurisdiction over employees of interstate motor carriers for safety purposes extends to all employees in the classes specified (drivers, drivers' helpers, loaders and mechanics), regardless of the quantum of safety work performed by any individual within one of such classes in any one work week. It should be pointed out, moreover, that the Commission, since the early days of regulation of interstate motor carriers, has consistently indicated that its safety jurisdiction was so applicable.

In *Ex Parte No. MC-2*, 11 M.C.C. 203, decided January 27, 1939, the Commission, on rehearing, said (p. 212):

> At the oral argument, counsel for the International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, contended that, while our authority to prescribe maximum hours of service was limited to those employees whose activities affect the safety of operation, we may, when that *class* has been ascertained, consider other factors in determining the maximum hours to be prescribed. . . . (Emphasis supplied)

The excerpt quoted also shows that at a time early in the life of the Fair Labor Standards Act, motor carrier employee organizations also interpreted the jurisdiction of the Commission to apply to classes of employees.

In *Ex Parte No. MC-28*, 13 M.C.C. 481, decided May 9, 1939, the Commission said (p. 483):

> It is clear to us that we have power to prescribe qualifications and maximum hours for drivers and their helpers employed by private carriers of property who are engaged in driving or operating motor vehicles transporting property in interstate and foreign com-

> merce. It may be that the activities of other employees are such that "to promote safety of operation" we have power to prescribe qualifications and maximum hours of service for them. As to what *classes* or *types* of employees, if any, may be included in this category, we do not decide here. (Emphasis supplied)

It is clear that there has been no change in the Commission's interpretation of its safety jurisdiction over employees of interstate motor carriers. Although the earlier decisions of the Commission relating to its safety jurisdiction do not specifically refer to "classes" of employees engaged in work the nature of which affects the safety of operation of motor vehicles in interstate commerce, we think the language used therein leaves no doubt that the Commission has always interpreted its safety jurisdiction to be applicable to classes of employees. See, for example, the Commission's first report in *Ex Parte No. MC-2*, 3 M.C.C. 665, decided Dec. 29, 1937, in which the whole purport of the decision leads to this conclusion.

This court long ago said:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. *United States v. Moore*, 95 U. S. 760 (1878).

This has been the settled rule down through the years. Cf. *Great Northern Ry. Co. v. United States*, 315 U. S. 262 (1942). There are no "cogent reasons" why the rule should not be observed insofar as the Commission's consistent and practical interpretation of its safety jurisdiction under Section 204(a) of the Motor Carrier Act is concerned.

In *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, decided May 27, 1940, this Court approved the Commission's interpretation of its safety jurisdiction under Section 204(a) of the Motor Carrier Act and held that such jurisdiction was limited to "those employees whose activities affect the safety of operation" (p. 553). The Com-

mission had theretofore, on several occasions, as shown above, clearly indicated that its safety jurisdiction, to the degree applicable, extended to *classes* of employees. This Court, in the *American Trucking Associations* case, supra, in no way indicated that this was not a proper interpretation and to that extent, we think, gave its tacit approval of the Commission's conclusion referred to. In view of this, we are at a loss to understand the success with which the Commission's decision in *Ex Parte No. MC-2*, 28 M.C.C. 125, decided March 4, 1941, has been collaterally attacked in many courts. But such is the case and the time has come when another decision of this Court upon the same subject is required to put the matter finally at rest.

Reverting to the main point of emphasis, however, we suggest that no pertinent decision of the Commission more fully demonstrates that agency's conception of its jurisdiction as being applicable to *classes* of employees than that in *28 M.C.C. 125*. In that case, after full consideration of the evidence and the issues, it enumerated (pp. 138-139) the additional classes embraced within its jurisdiction: helpers, loaders and mechanics. (The class of drivers had already been established. 3 M.C.C. 665.)

Aside from the Commission's expertise insofar as the determination of which classes of employees of interstate motor carriers perform duties affecting safety of operation is concerned, contrast the consistency of its position in this matter with that of the Administrator of the Wage and Hour Division of the Department of Labor.

In his Interpretative Bulletin No. 9 (fourth revision, March, 1942) the Administrator held that a truck driver who spent in excess of 20 percent of his total work time in any one week in "non-exempt activities" could not be considered within the scope of the overtime exemption contained in Section 13(b)(1) of the Fair Labor Standards Act, "notwithstanding the fact that the Interstate Commerce Commission may regulate the hours of service of such driver under the Motor Carrier Act." 1943 Wage-

Hour Manual 189. However, in the fifth revision of his Bulletin No. 9, November, 1943, the Administrator has decided that motor carrier employees whose duties affect safety may be considered within the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act provided that they do not devote the "greater part" of any workweek at non-exempt activities. 1944-1945 WH Manual 523.

It is highly important that the authority of the Interstate Commerce Commission in the premises be understood. It is the Commission that possesses primary jurisdiction; it is the Commission that is responsible for the safe operation of motor vehicles and the rules and regulations governing the qualifications and hours of service of employees. U.S.C., Title 49, Sec. 304(a)(1), (2), (3). This is but a current illustration of the primary jurisdiction doctrine which was long ago recognized by this Court in the *Abilene Cotton Oil Case*, 204 U. S. 426 and which is still understood to be sound law.

II. Uniform Interpretation of the Exemption Provisions of Section 13(b)(1) of the Fair Labor Standards Act is Necessary But Presently Lacking.

In respondent's original brief, page 2, we stated the question as follows:

> Did the services rendered by the petitioner, as the same appear from the record in this case, substantially affect the safety of operation of the respondent's motor vehicles used by it as a common carrier of freight in interstate commerce?

Stated somewhat more broadly the question is whether or not an employee belonging to one of the classes which the Commission has indicated is subject to its safety jurisdiction need devote any specified quantum of his time in any work week to be exempt from the overtime provisions of the Fair Labor Standards Act for such week.

This Court has not heretofore passed specifically upon the question, although it has been raised in pleadings filed with it. Petitioner's brief, filed with this Court in *Richardson* v. *James Gibbons Co.*, No. 725, October Term, 1942, reads in part (pp. 8-9):

> Another aspect of this case relates to the duties performed by petitioner for respondent as a "Distributor-Operator," and the incidental work done by petitioner in driving the trucks. Petitioner operated the machinery of the "distributor" mounted on the truck chassis and at times acted as driver of the trucks. His work in operating the machinery of the "Distributor" was that of a technician; his work in driving the trucks, that of a Chauffeur. Was the incidental chauffeuring sufficient to take him without the protection and deprive him of the benefits of the Fair Labor Standards Act; petitioner holds that it was not. Petitioner suggests that the literal interpretation of the Fair Labor Standards Act of 1938, as indicated in the opinion of the District Court and the Circuit Court of Appeals, defeats the remedial purposes and intent of said Act, one of which was to insure employees, engaged in "commerce", overtime compensation for hours worked in excess of the legal maxima set forth in that statute.

This Court's decision in the *Richardson* case, embracing also *Southland Gasoline Company* v. *Bayley*, 319 U. S. 44, went only to the question of whether or not the Commission's power to regulate the qualifications and maximum hours of service of employees of private motor carriers whose duties affected safety of operation applied prior to May 1, 1940, the date on which the Commission first found need for such regulation. *Ex Parte No. MC-3*, 23 M.C.C. 1. But it seems reasonable to assume that the Court considered petitioner's position cited above to be without merit since no mention thereof appears in its decision.

The petitioner in the *Richardson* case presented the same argument before the Circuit Court of Appeals for the Fourth Circuit. That court made short shrift of the argument, saying (122 F. 2d 627, 628):

Nor are we impressed by Richardson's contention that "whatever driving of the truck, or trucks (upon which the Distributor Tank and Mechanism were mounted) that he did was but incidental to his main employment of 'Distributor-Operator'"; and that, therefore, he is within the provisions of the Fair Labor Standards Act, because "the Interstate Commerce Commission has not the power to establish for him, the plaintiff, qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935." See Rozmus v. Jesse F. Davis & Sons Co., 23 N.Y.S. 2d 821 (truck driver and delivery man, who also performed services about the yard where employer's business was conducted); Gavril v. Kraft Cheese Co., D. C., 42 F. Supp. 702 (driver-salesman of cheese and food products). The case of State of Maryland v. Depew, 175 Md. 274; 1 A. 2d 926, has a setting so different from the instant case that the decision there is not helpful to the plaintiff. And the fact that the contents of the truck or trucks driven by Richardson, were liquid asphalt products, which, counsel for Richardson admits in his brief, are "flammable and explosive," we think, brings his case even more clearly within the decision of the American Trucking Associations' case, supra.

Farther on in its opinion (pp. 629-630), the court had this to say as to the desirability of liberal construction of the Fair Labor Standards Act:

> We cordially agree with the opinion in the Bayley case that the Fair Labor Standards Act, as a remedial statute, must be liberally construed. This we developed at some length in Missel v. Overnight Motor Transportation Co., 4 Cir., 126 F. 2d 98. But salus populi suprema lex esto and we should be equally careful not to restrict unduly any federal statute which, in the interest of public safety, undertakes to clothe the Interstate Commerce Commission with power to encompass so worthy an end. The vast importance of the private carrier of goods by motor vehicle is too well known to require comment. Congress must have appreciated this. We think, accordingly, that Congress was pretty well convinced that the Interstate Com-

merce Commission would (as it did) make a finding of the necessity of regulating these carriers. Any other finding would have been little less than shocking to the American public.

That employees of all motor carriers, whether common, contract, or private, subject to the jurisdiction of the Interstate Commerce Commission for safety purposes, stand on an equal footing so far as the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act are concerned, has now been established beyond doubt. In the instant case, this Court is respectfully requested to determine, once and for all, precisely what that footing is in order that all lower courts, trial and appellate, may be in a position to interpret uniformly in the future the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act of 1938.

The contrariety of judicial philosophy as set forth in the various opinions of the District and Circuit Courts which have passed upon this issue in one way or another necessitates a direct answer by this Court to the question posed.

A brief reference to a few of the many decisions arising out of the conflict between the Administrator's interpretation of the provisions of Section 204 of the Motor Carrier Act, 1935 (now Interstate Commerce Act, Part II), and that of the Commission will best illustrate the fact that uniformity of interpretation of the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act is an utter necessity if the question here involved is ever to be finally settled.

Despite the obvious fact that the Administrator has no authority to make legally binding interpretations of the exemption provisions in question, some of the court decisions dealing with this matter seem to accept his interpretation as gospel, although not in all instances specifically referring thereto.

In *Aulchick* v. *Transamerican Freight Lines, Inc.*, 46 F. Supp. 861, the United States District Court for the Eastern District of Michigan said (p. 865):

Therefore, we hold that for those weeks where plaintiffs devote a substantial part of their time to the type of work enumerated in (b)(c)(d)(f) and part of (a) italicized these plaintiffs are entitled to recover time and one-half for overtime as provided in the Fair Labor Standards Act. And in arriving at what is meant by "substantial" we must accept the Interpretative Bulletin No. 9 U. S. Department of Labor, Wages and Hours Division and the legal field letter dated May 23rd, 1941, sent out from the Office of the Solicitor of the Department of Labor in which it states that

"Any amount of work in excess of 20 percent of the total number of hours worked by the particular employee within a particular work week" brought the employee out of the Commission's jurisdiction.

United States v. American Trucking Associations, Inc., supra, is authority for the legal position that such "interpretations" though not conclusive are entitled to great weight. *Personally we do not believe that twenty percent is a "substantial" part of one hundred percent but the finding of the labor department is fortified by the decisions of our courts.* (Citing cases) (Emphasis ours)

We submit that the court, in the *Anuchiek* case, must have confused the meaning of this Court's decision in the *American Trucking Associations* case in arriving at its conclusion that "we must accept the Interpretative Bulletin No. 9 U. S. Department of Labor, etc." Further, we think it failed to differentiate, in giving weight to the interpretation of the Administrator, between those instances where the Fair Labor Standards Act is being interpreted generally and where the exemption provisions of Section 13(b)(1) of that Act (plainly delegating to the Interstate Commerce Commission the interpretative duty) are under consideration.

And in *Walling* v. *Gordons Transports*, 8 WHR 838, the United States District Court for the Western District of Tennessee gave full effect to the "fifty-one percent" interpretation of the Administrator, although not referring specifically to it. There the court said (p. 841):

> Even where a particular employee devotes a portion of his working time during particular workweeks to work which is exempt under Section 13(b)(1) of the Fair Labor Standards Act, the exemption will be inapplicable to such employee in any workweek in which the employee devotes the greater part of his time to work of a non-exempt character.

It seems clear that the trial court in the instant case gave effect to the Administrator's "fifty-one percent" interpretation. We quote from page 11 of the Transcript of Record herein:

> The court further finds that plaintiff's work to be performed, *or the major portion thereof*, for the period herein sued did not affect the safety of defendant's operations within the meaning of Section 16(b)(sic) of the Fair Labor Standards Act and is not exempt under and by virtue of the provisions of said Section 16(b)(sic) of the Fair Labor Standards Act of 1938. (Emphasis supplied.)

Adding to the confusion is a recent decision of the Circuit Court of Appeals for the Second Circuit which, while holding that the Administrator's "fifty-one percent" interpretation violates the plain language of Section 13(b)(1) of the Fair Labor Standards Act, goes on to arrive at its own independent conclusion that the motor carrier employees in question (drivers) were not subject to the Commission's power to regulate their qualifications and maximum hours of service because their activities in interstate transportation consumed only three hours' work per week. *Walling* v. *Comet Carriers, Inc.*, 151 F. 2d 107, decided August 17, 1945. Referring to the interpretation of the Administrator, the Court said (p. 111):

> The Administrator of the Wage and Hour division has defined the scope of the exemption in Section 13(b)(1) in a manner which conflicts with the ruling of the Commission. See Interpretative Bulletin No. 9 (October 1943). His interpretation was made for the guidance of those engaged in administering the Act under

his supervision and is, in short, that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time in work other than that which forms the basis of the exemption."

Perhaps this would be a desirable way to resolve the inevitable conflict in the jurisdiction of these two administrative agencies. The Interstate Commerce Commission is primarily concerned with the maintenance of safety in interstate and foreign commerce, and its restriction of the number of hours in which those so engaged may work in any one work week is obviously intended to prevent accidents due to fatigue, without regard to considerations of adequacy of compensation; while the Administrator of the Wage and Hour Division is primarily concerned with the elimination of substandard wages, regardless of the number of hours worked or the effect of fatigue upon the workers. *We think, however, that the plain language of § 13(b)(1) of the Fair Labor Standards Act cannot be construed so loosely as the Administrator construes it.* That section exempts from the provisions of § 7 of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." *There is nothing in the last-mentioned statute which limits the power of the Commission to regulate qualifications and maximum hours of work to those of employees who are engaged in interstate commerce for the greater part of their working time in any one work week. So to construe it would seriously impair the effectiveness of control over the safety of operation and would leave much interstate and foreign carriage by motor vehicle unregulated in that respect.* (Emphasis ours)

Needless to say, we are in complete agreement with that portion of the Court's opinion quoted above. However, the Court goes on to say:

> Nor need we so construe it in this instance. Proof that two employees worked only three hours a week in interstate transportation and that two employees made

> "some" and "occasional" deliveries to the warehouses of chain stores and worked the remaining time in the production of goods for commerce does not satisfy the requirement that the amount of time during which they are engaged in interstate commerce be substantial. This comparatively small amount of work was not enough to put the employee who performed it within the Commission's power of regulation and left them outside the exemption provided in § 13(b)(1) of the Fair Labor Standards Act. See Levinson v. Spector Motor Service, 389 Ill. 466, 59 N. E. 2d 817.

The last quoted portion of the opinion of the Circuit Court of Appeals for the Second Circuit overlooks entirely, it seems to us, the obvious purpose of providing exemption from the overtime provisions of the Fair Labor Standards Act of "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." Congress, in enacting the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act, was not attempting to promote a guessing game between the Commission, the courts and the Administrator of the Wage and Hour Division. It was simply recognizing the obvious fact that the mere quantum of time is not a proper yardstick by which to measure an employee's contribution to safety. It is conceivable, and experience has demonstrated that even a few moments of intelligent, thoughtful and properly supervised planning and direction may exert an influence upon safety of operation far out of proportion to the amount of time consumed in such supervision and may very well spell the difference between life and death. We, therefore, respectfully submit that the true test of whether or not a man is within that class of employees whose activities substantially affect safety of operations is: "What does he do?"; not "How long does it take him to do it?" This seems to be the ground upon which the Appellate Court of Illinois held petitioner herein to be subject to the safety jurisdiction

of the Commission and exempt from the overtime requirements of the Fair Labor Standards Act. As pointed out in the Commission's brief (p. 28), Congress, in delegating to the Commission the authority to regulate the qualifications and maximum hours of employees of interstate motor carriers whose duties affect safety of operation, intended a practical application of such authority.

If the courts are free to ignore the Commission's findings of fact in *Ex Parte No. MC-2, supra,* and to arrive at their own independent conclusions with respect to whether or not a specified motor carrier employee is subject to the Commission's authority to regulate his qualifications and maximum hours of service, we may indeed expect a varied picture in the different judicial circuits with respect to what constitutes a "substantial" amount of time sufficient to render an employee subject to the jurisdiction of the Commission. It should be noted that the Court of Appeals for the Second Circuit also said in the *Comet Carrier* case (p. 111):

> The trial court held, relying upon Ex Parte No. MC-3, 23 M. C. C. 1, 39, that safety employees of the defendant engaged at least one day a week in carriage across state lines were exempt for that week. Whether or not that was a substantial amount of work would, of course, depend upon the extent of work thus done and *at least one day's work in any one week could reasonably be considered substantial.* (Emphasis ours)

Thus it will be seen that the Second Circuit Court of Appeals considers one day's work affecting safety of operation in any one workweek as sufficient to subject an employee of an interstate motor carrier to the safety jurisdiction of the Interstate Commerce Commission and exempt him from the overtime provisions of the Fair Labor Standards Act. If this position is tenable, then every other Circuit Court is free to arrive at a different conclusion as to what constitutes sufficient working time in activities affecting safety of operation to place a motor carrier em-

ployee under the safety jurisdiction of the Commission. Again we say that the Commission is the agency to which Congress has delegated the duty (both under Section 204 of the Motor Carrier Act and Section 13(b)(1) of the Fair Labor Standards Act) in the first instance, of determining which employees of interstate motor carriers perform duties affecting safety of operation. The Commission has performed that duty and has specified certain classes of employees as being engaged in such activities.

In upholding the Commission's interpretation that its authority to regulate qualifications and maximum hours of service of motor carrier employees applied only to those employees whose duties affected safety of operation, this Court (by a five to four decision) overruled the decision of a three-judge statutory court holding that *all* employees of interstate motor carriers were subject to the Commission's jurisdiction to regulate their qualifications and maximum hours of service. *American Trucking Associations, Inc.* v. *United States*, 31 F. Supp. 35. Had that Court's decision remained the law, motor carrier employers would not have been required to pay overtime to any of their employees by virtue of the Fair Labor Standards Act. Thus they would have been on a par with their chief competitors, the railroads, who are not required by the Wage-Hour law to comply with the overtime provisions of Section 7 of the Act.

Following the Commission's decision in *Ex Parte, No. MC-2, supra*, the motor carrier industry and the respondent here accepted at face value the Commission's findings of fact that only drivers, drivers' helpers, loaders and mechanics, as a class, perform duties affecting safety of operation and are consequently exempt from the overtime provisions of Section 13(b)(1). If the Administrator of the Wage and Hour Division, while stating in his Interpretative Bulletin No. 9 that it is not intended to be binding, may go before the courts seeking injunctions against motor carriers in cases which constitute collateral attacks upon the Commission's

decision in *Ex Parte No. MC-2, supra*, what is to prevent those same motor carriers from seeking court decisions holding, for example, that a dispatcher "spends a substantial amount of his time in duties affecting safety of operation" and is therefore exempt from the overtime provisions of the Fair Labor Standards Act? Motor carriers, by and large, have attempted to live up to the provisions of the Fair Labor Standards Act in the light of the Commission's decision in *Ex Parte No. MC-2*. Their task has been made extremely difficult if not in fact impossible, by the Administrator's constant effort to offset, indirectly, the effect of the Commission's decision therein.

III. The Commission's Decision May Not Be Collaterally Attacked but is Subject to Proper Review.

The principle that judgments of administrative agencies as to matters of fact may not be collaterally attacked has been long established. In *St. Louis Smelting & Refining Co.* v. *Kemp*, 104 U. S. 636, 26 L. Ed. 875, decided March 6, 1882, this Court said:

> In the course of their duty, the officers of that [Land] Department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment.

In *Hanson* v. *Hoffman*, 113 F. 2d 780, decided May 24, 1940, the Circuit Court of Appeals for the Tenth Circuit applied the principle of the *St. Louis Smelting Co.* case, supra, in holding that legal title to property of an Indian

testator, having vested through administrative action of the Secretary of the Interior in approving the will, could not be collaterally attacked.

That actions by employees of interstate motor carriers or the Wage and Hour Administrator, whereby the courts are asked to rule that employees (of a class which the Commission has declared subject to its safety jurisdiction) are not exempt from the overtime provisions of the Fair Labor Standards Act constitute collateral attacks upon the Commission's findings of fact in *Ex Parte No. MC-2, supra*, seems too plain to labor. We are at a loss, especially, to understand the reluctance on the part of the Administrator to make a *direct* attack upon the Commission's findings, if, as his actions so clearly indicate, he believes them to be erroneous.

As indicated earlier herein the diversity of opinion among the various lower courts has brought about a situation in which an interstate motor carrier cannot ascertain his rights and obligations. Respondent finds itself in just this position. Accordingly both practical and legal considerations force us to differ with what we construe to be the Commission's position with regard to its decision in *Ex Parte No. MC-2* as evidenced by its brief amicus. Briefly, it would seem to be that the Commission's findings of fact therein with respect to which classes of employees of interstate motor carriers perform duties affecting safety of operation are correct, but that the courts remain free to ignore them in any case involving the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act, and to substitute their judgment for that of the Commission in arriving at their independent conclusions as to whether or not a certain employee performs duties affecting safety of operation.

The following statement appears at page 4 of the Commission's brief:

> It is here further mentioned that while, in the above case [United States v. American Trucking Associa-

> tions, Inc.], the Court's opinion states that the interpretation and meaning which the Commission and also the Wage and Hour Division of the Department of Labor had placed on subparagraphs (1) and (2) of section 204 (a) should be accorded great weight (p. 549), the opinion also makes plain (p. 544) that, except for the rule of according great weight to the views of administrative bodies, such "interpretation of the meaning of statutes, as applied to judicial controversies, is exclusively a judicial function."

We respectfully submit that it is precisely because some of the courts have ignored the Commission's findings of fact in *Ex Parte No. MC-2, supra*, and substituted their opinion for the expert judgment of the Commission with respect to which activities of motor carrier employees affect safety of operation that this Court is now called upon to settle the conflict which has inevitably arisen.

The function of the courts in cases wherein the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act is pleaded as a defense to an action brought under that Act is, we suggest, rather limited. We think in such cases the courts' task is confined to a determination of whether or not the duties of the employee are such as to place him within the rather broad sweep of the language used by the Commission in its description of the classes of employees subject to its safety jurisdiction. Applying this test to the instant case, we note the following language of the Commission in *Ex Parte No. MC-2*, 28 M. C. C. 125, 133-134:

> The practice of small carriers in regard to the employment of loaders differs from that of the large carriers. The drivers employed by the small carriers load and unload the motor vehicles. This situation presents no problem for decision here, because as these men are drivers, we have, in our prior decisions, found them subject to our jurisdiction.
>
> The large carriers, however, and particularly those who have important operations from terminal to termi-

nal, employ men *variously called loaders, dockmen, or helpers, and hereinafter called loaders, whose sole duties are to load and unload motor vehicles and transfer freight between the vehicles and the warehouse.* (Emphasis supplied)

It seems abundantly clear that the Commission, in defining loaders, intended to encompass within its definition all those dock employees of interstate motor carriers subject to its jurisdiction whose duties were such as to require their inclusion as a member of the "gang" needed to load and unload motor vehicles at the terminals of the carriers. And we believe the decision of the Illinois Appellate Court in the instant case, 56 N. E. 2d 142, gives recognition to this theory.

As we read the Commission's brief, it proceeds on the assumption that its findings of fact in *Ex Parte No. MC-2, supra*, to the effect that certain classes of employees of interstate motor carriers perform duties affecting safety of operation, belong in the same category as its earlier interpretation of the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act, made prior to and affirmed by the decision of this Court in the *American Trucking Associations* case, supra. We think they are not comparable at all. When the Commission early decided that its jurisdiction to regulate the qualifications and maximum hours of service of employees of interstate motor carriers extended only to those employees whose duties affected safety of operation, it was, without question, interpreting the statute. But when later, after exhaustive hearings, it found, as a fact, that drivers, drivers' helpers, loaders and mechanics employed by interstate motor carriers performed duties affecting safety of operation, it was by no means engaged in construing the statute, though what it did was done at the direction of the statute. Its previous construction of the statute had already been upheld by this Court, *United States* v. *American Trucking Associations, Inc., supra.* This being so, it became neces-

sary for the Commission, through its administrative processes, to exercise the authority delegated by Congress and determine, as a fact, which employees of interstate motor carriers perform duties affecting the safety of operation of vehicles in interstate or foreign commerce.

Mr. Justice Douglas, dissenting in *Southern Pacific Co. v. Arizona*, 325 U. S. 761, said (p. 795):

> . . . Congress has given the Interstate Commerce Commission broad powers of regulation over interstate carriers. The Commission is the national agency which has been entrusted with the task of promoting a safe, adequate, efficient, and economical transportation service. It is the expert on this subject. . . .

It was in the exercise of its safety jurisdiction that the Commission, subsequent to this Court's decision in the *American Trucking Associations* case, reopened *Ex Parte No. MC-2* for the purpose of determining, as a fact, which classes of employees of interstate motor carriers, in addition to drivers, perform duties affecting safety of operation. And the mere fact that the Commission's findings of fact set forth therein would, if accepted by the courts, have the effect of exempting from the overtime provisions of the Fair Labor Standards Act all employees of interstate motor carriers whose duties are such as to place them in one of the exempt categories cannot change the nature of the administrative proceeding undertaken by the Commission from a purely fact-finding effort to the interpretation of a statute. Insofar as the Commission's conclusions of law enumerated in *Ex Parte No. MC-2* are concerned, they constitute merely a restatement of its previous interpretation of the statute, approved by this Court in the *American Trucking Associations* case, supra.

The question of whether or not the latest decision of the Commission in *Ex Parte No. MC-2, supra*, can be considered in effect a reviewable order is a perplexing one. The Commission, after pointing out that its safety jurisdiction extends to classes of employees whom it designates

"mechanics," "loaders," and "helpers," in addition to drivers for whom qualifications and maximum hours of service had already been established,[1] closed its opinion with these words: "No order is necessary at this time."

This Court, in distinguishing between orders of the Commission which are reviewable and those which are not, said in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130-131:

> The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a "final valuation" under the Valuations Act: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; *which does not determine any right or obligation.*" United States v. Los Angeles R. R., 273 U. S. 299, 309, 310, 47 S. Ct 413, 414, 71 L. Ed. 651. (Emphasis ours)

Although, as previously stated, the Commission issued no formal order in its latest decision in *Ex Parte No. MC-2, supra*, the first paragraph of its report therein states, among other things:

> . . . Before the Wage and Hour Division of the Department of Labor, which administers the provisions of the Fair Labor Standards Act, or the common, contract, and private carriers can well determine which employees are subject to the provisions of section 7 of that act, they must know the extent of our jurisdiction.

From this beginning, the Commission's report went on to state, clearly and unequivocally, that its jurisdiction to

[1] *Maximum Hours of Service of Motor Carrier Employees*, 11 M. C. C. 203; *Motor Carrier Safety Regulations—Private Carriers*, 23 M. C. C. 1.

regulate the qualifications and maximum hours of service of employees of interstate motor carriers extended, in addition to drivers, to those classes of employees whom it designated as "mechanics," "loaders," and "helpers."

It is clear that the Commission's report in *Ex Parte No. MC-2, supra*, did determine the right of all employees of interstate motor carriers, with the exception of the four exempt classes, to enjoy the benefits of the overtime provisions of the Fair Labor Standards Act, as well as the right of motor carrier employers to consider those employees falling within the four specified exempt categories as being exempted from these same overtime provisions.

It is noted that the administrative proceeding by the Commission which led eventually to this Court's decision in *United States* v. *American Trucking Associations*, 310 U. S. 534, did not result in the issuance of a formal order by the Commission. *Ex Parte No. MC-28*, 13 M.C.C. 481. In its report therein the Commission merely set forth its conclusion of law that its jurisdiction to regulate qualifications and hours of service of employees was limited to those whose duties affected safety of operation, and discontinued the proceeding. Following this, the aggrieved motor carriers filed suit for a mandatory injunction to compel the Commission to consider their petition for the establishment of reasonable requirements with respect to qualifications and maximum hours of service for *all* employees of common and contract motor carriers. The statutory court which heard the case treated the Commission's report just as though a formal order had been entered. In its opinion in *American Trucking Associations, Inc.* v. *United States*, 31 F. Supp. 35, it said (pp. 36-37):

> Jurisdiction of the court is conceded. Sec. 205(h) of the Motor Carrier Act [now Sec. 205(g), Interstate Commerce Act, Part II]; Interstate Commerce Comm. v. United States ex rel. Humboldt Steamship Co., 224 U. S. 474, 32 S. Ct. 556, 56 L. Ed. 849; United States ex rel. Louisville Cement Co. v. Interstate Commerce Comm., 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914;

United States ex rel. Kansas City So. Ry. v. Interstate Commerce Comm., 252 U. S. 178, 40 S. Ct. 187, 64 L. Ed. 517.

This Court in *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, had occasion to pass upon the effect of a determination by the Commission, for the purposes of the Railway Labor Act, 45 U.S.C. § 151 et seq., that the railroad was not an interurban electric railway, and of the scope of judicial review of that determination. There it said (pp. 182-183):

> We have held that the determination of the Commission is not an "*order*" reviewable under the Urgent Deficiencies Act of October 22, 1913. Shannahan v. United States, supra. But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the Shannahan Case, we had no occasion there to consider. . . . The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory scheme. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act which was enacted to regulate the activities of transportation companies engaged in interstate commerce.

There is a striking similarity between the situation which prevails when the Commission determines, for purposes of the Railway Labor Act, whether or not a railroad is an interurban electric railway, and the determination of the Commission, in *Ex Parte No. MC-2, supra.* In each instance, the determination of the Commission in turn ascertains the extent to which another statute than the Interstate Commerce Act applies to employees of the carriers involved, but in the present case the Commission acts pursuant to specific mandate of the Interstate Commerce Act (49 U.S.C. Sec. 304(a)). In each case also the determi-

nation of the Commission is part of a regulatory scheme. And just as the Commission's determination, if validly made, determines the question of whether or not the carrier is subject to the requirements of the Railway Labor Act, to the same extent it should determine the extent to which motor carrier employers are subject to the hours provisions of the Fair Labor Standards Act. The authority in the present instance, however, flows from the very law creating the Commission, and at the same time furnishes the legal basis for the promulgation of its safety regulations.

This Court, in *Illinois Central Railroad Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 27 S. Ct. 700, 704, said:

> And the findings of the Commission are made by law prima facie true. This court has ascribed to them the strength due to the judgment of a tribunal appointed by law and informed by experience. (Citing cases). And in any special case of conflicting evidence, a probative force must be attributed to the findings of the Commission, which, in addition to "knowledge of conditions, of environment, and of transportation relations," has had the witnesses before it and has been able to judge of them and their manner of testifying. . . .

In *Board of Trade of Kansas City, Mo.* v. *United States*, 314 U. S. 534, this Court said:

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.

The statement of the Court with respect to the rate making powers of the Commission would seem to be equally applicable to the Commission's safety powers. The Commission's administrative processes must be fluid and chang-

ing if it is to continue to discharge its duty, delegated by Congress, to promote safety of operation of motor trucks on the nation's highways.

The Commission's latest decision in *Ex Parte No. MC-2, supra*, has never been the subject of direct attack in the courts. While we agree with the statement in the Commission's brief (pp. 24-25) that neither the Commission's nor the Wage-Hour Administrator's determination of the status of employees is in any sense final except as sustained by the courts, we respectfully suggest that judicial review of the determinations of the Commission in *Ex Parte No. MC-2* may not be forever postponed while the courts continue to entertain actions by motor carrier employees and the Wage and Hour Administrator which collaterally attack the correctness of those same determinations.

IV. The Commission's Power to Regulate Qualifications and Maximum Hours of Service of Specified Classes of Motor Carrier Employees Cannot Evaporate Through Lack of Administrative Exercise.

This Court, in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, said (p. 352):

> Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise.

Cf. *United States* v. *American Union Transport*, — U. S. —, 66 S. Ct. 664, 653, footnote 18.

At the original oral argument in the instant case, reference was made to the fact that the Commission has, up to the present time, issued regulations governing qualifications and maximum hours of service applicable only to drivers of motor vehicles operating in interstate commerce. It was there argued that a motor carrier employee whose qualifications and maximum hours of service have not been regulated by the Commission should not be denied the benefit of the overtime provisions of the Fair Labor Standards

Act. We believe this Court fully answered that argument in the *Bayley* case, supra, and we need do no more than mention it here.

During the last session of Congress a very determined effort was made to enact legislation which would have had the effect of validating an interpretation of the Administrator of the Wage and Hour Division made prior to this Court's decision in the *Bayley* case, as well as his present "fifty-one per cent" interpretation of the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act. It will be recalled that one of the Administrator's early issues of Interpretative Bulletin No. 9 took the position that, until the Commission determined "that a particular class of employees of common and contract motor carriers other than drivers affect the safety of operation of motor vehicles" employees other than drivers could not be considered exempt from the overtime provisions of the Fair Labor Standards Act. *Interpretative Bulletin No. 9, first revision*, July, 1939. In that same bulletin the Administrator held that until a finding of need for regulation of private carriers had been made by the Commission, no employees of private carriers could be considered exempt from the overtime provisions of the Fair Labor Standards Act. 1940 WH Man. 169-170.

S. 1349, introduced August 1, 1945, (91 *Cong. Rec.* 8210) provided, among other things, for the amendment of Section 13(b)(1) of the Fair Labor Standards Act, to read as follows:

> The provisions of section 7 [overtime] shall not apply with respect to (1) any employee who during the greater part of any workweek is engaged in work with respect to which the Interstate Commerce Commission has established qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . .

As reported by the Senate Committee on Education and Labor March 5, 1946 (92 *Cong. Rec.* 1942) S. 1349 contained

the proposed amendment of Section 13(b)(1) of the Fair Labor Standards Act referred to above. *Senate Report No. 1012*, 79th Cong., 2d Sess. However, the provision in question was eliminated from S. 1349 on the Senate floor (92 *Cong. Rec.* 3247) prior to passage of the bill by the Senate on April 5, 1946. 92 *Cong. Rec.* 3267.

The proposed amendment to Section 13(b)(1) of the Fair Labor Standards Act which would have placed the stamp of Congressional approval upon the interpretations of the Administrator referred to has fallen by the legislative wayside, but the conflict between the Administrator's Interpretative Bulletin No. 9 and the Commission's decision in *Ex Parte No. MC-2, supra*, still remains.

Conclusion.

Summed up, we think it clear that:

Congress, in enacting the Motor Carrier Act, 1935, by Section 204(a)(1) thereof authorized the Commission to "establish reasonable requirements" with respect to qualifications and maximum hours of service of employees of interstate motor carriers, and that power has never been withdrawn.

Congress, in enacting the Fair Labor Standards Act of 1938, chose to continue to invest the expert body, the Commission, with the authority referred to above.

The Commission's interpretation to the effect that its jurisdiction to regulate the qualifications and maximum hours of service of motor carrier employees applies only to such employees whose duties affect safety of operation was sustained by this Court in *United States* v. *American Trucking Associations, Inc., supra.* Further, the Commission's previous indication that its jurisdiction, for safety purposes, extended to classes of employees engaged in duties affecting safety received the tacit approval of this Court in the same case.

The Commission's latest decision in *Ex Parte No. MC-2*, 28 M.C.C. 125, was purely a fact-finding proceeding, neces-

sary to determine just which classes of employees of motor carriers perform duties affecting safety of operation. Insofar as its conclusions of law therein are concerned, they are but a reiteration of those previously approved by this Court in the *American Trucking Associations* case.

The decision of the Commission in *Ex Parte No. MC-2, supra,* was rendered after a full hearing participated in by employee representatives, employers and other interested parties, is supported by substantial evidence, and the courts should not countenance collateral attacks upon it.

The facts of this case show that Petitioner Levinson was at all times either a loader or foreman in charge of all men on the dock loading and unloading, or a checker, which in respondent's operations is merely another name for a supervisor of loaders or chief loader.

Levinson was a member of a class whose duties affect the safety of operation of motor vehicles in interstate or foreign commerce, was included within the Commission's decision in 28 M.C.C. 125, and he and others falling within the classes enumerated by the Commission are not subject to the overtime provisions of the Fair Labor Standards Act.

Respectfully submitted,

HARRY J. LURIE,
JOSEPH L. GOLDEN,
MAURICE P. GOLDEN,
DAVID AXELROD,
39 S. La Salle Street,
Chicago, Illinois,

ROLAND RICE,
1424 16th Street, N. W.,
Washington, D. C.,
Counsel for Respondent.

PETER T. BEARDSLEY,
Of Counsel.

1424 16th St., N. W.,
Washington 6, D. C.

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No. 22

In the Supreme Court of the United States

OCTOBER TERM, 1945

MAX LEVINSON, PETITIONER

v.

SPECTOR MOTOR SERVICE, A CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

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he Supreme Court of the United States

OCTOBER TERM, 1945

No. 139

MAX LEVINSON, PETITIONER

v.

PECTOR MOTOR SERVICE, A CORPORATION,
RESPONDENT

IT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

F OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

STATEMENT

brief amicus curiae is submitted by the In-
e Commerce Commission at the suggestion
Court.

facts are fully developed in the petition for
f certiorari and briefs filed in support
and in opposition thereto.

matter before the Court involves the ques-
whether the petitioner, Max Levinson, an
ee of the respondent, is entitled to recover
e pay under section 7 of the Fair Labor

Standards Act of 1938 (52 Stat. 1860; 29 U. S. C., sections 201–219) or whether he, as an employee of a common carrier by motor vehicle subject to the Motor Carrier Act of 1935 (Part II of the Interstate Commerce Act, 49 U. S. C., section 304), is excepted from that section of the Labor Standards Act by section 13 (b) of the latter, which provides:

> The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

The Motor Carrier Act (Part II of the Commerce Act), by its section 204, above referred to, provides that:

> (a) It shall be the duty of the Commission—
>
> (1) To regulate common carriers by motor vehicle as provided in the Part, and to this end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment;
>
> (2) To regulate contract carriers by motor vehicle as provided in this Part, and to that end the Commission may establish

> reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment;
>
> (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. * * *

Following the enactment of the Motor Carrier Act, the Commission, in proceedings involving its authority with respect to employees of common and contract motor carriers under the above subparagraphs (1) and (2) of section 204 (a), concluded that its power was "limited to prescribing qualifications and maximum hours of service for those employees * * * whose activities affect the safety of operation." That is to say, while subparagraphs (1) and (2) do not in terms limit the "employees" of common and contract carriers covered, the Commission concluded from the Act's legislative history and other considerations that it was in fact intended to limit its power in the premises to those employees whose work affects such safety of operation. *Ex Parte No. MC-28*, 13 M. C. C. 481, 488.[1] And this construction of subparagraphs (1) and (2) was upheld by this Court in *United States* v. *American Trucking*

[1] Cf. *Ex Parte No. MC-2*, 3 M. C. C. 665, 667.

Associations, Inc., 310 U. S. 534, the Court saying (p. 553):

> Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in section 204 (a) (1) and (2) is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications or hours of service of any others.

It is here further mentioned that while, in the above case, the Court's opinion states that the interpretation and meaning which the Commission and also the Wage and Hour Division of the Department of Labor had placed on subparagraphs (1) and (2) of section 204 (a) should be accorded great weight (p. 549), the opinion also makes plain (544) that, except for the rule of according weight to the views of administrative bodies, such "interpretation of the meaning of statutes, as applied to judicial controversies, is exclusively a judicial function."[2]

Levinson, the petitioner herein, was employed by the respondent motor carrier as a checker of freight at its Chicago terminal. He was one of a gang of men engaged generally in the unloading and loading of freight and, in addition to his duties as checker, supervised and directed the work of the other men both in the unloading and

[2] Apparently this is not fully understood by petitioner. Petition for writ, p. 8.

in the loading of freight. Freight, it appears, is, for reasons of safety of operation, loaded into trucks according to size and weight; heavy weighted or "bottom freight" being distributed in the lower part of the truck and lighter weighted or "balloon freight" being placed at the top.

The trial court found that the major portion of Levinson's work did not affect safety of operation and, based on that finding, held that he was not exempted from section 7 of the Labor Standards Act by section 13 (b) (1) thereof. The Appellate Court, First District of Illinois, in reversing the judgment of the trial court held (petition, 22–23) that the quantity of "safety work" done was not a sound guide as to the applicability of the exemption; that the true determinant was "whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial;" and, in this connection, it found that there was no question that some part of Levinson's work was devoted to the direction and supervision of the loading; that there was no question either that the loaders in his gang were exempted; and, that, if they, in carrying out his directions were exempt because performing work affecting the safety of operation, it followed with all the more force that the duties of Levinson, who planned and directed the loading, affected that safety.

The Supreme Court of Illinois, although holding (R. 62–64), contrary to the view of the Appellate Court, "that the true determinant is not whether an employee performs any duties which substantially affect the safety of operation, but whether the duties affecting the safety are substantial," nevertheless, affirmed the judgment of the Appellate Court on the ground that the latter had found that Levinson was in the same position as the loaders in his gang; that the loaders were exempted and that Levinson therefore came within the exemption because he planned and directed the loading affecting the safety of operation. "The Appellate Court may," the Court said, "be in error in the reasons given for its judgment, but, under the facts as found by the court, the employee came within the same exemption as loaders, dockmen and helpers."

DISCUSSION

For reasons presently to be given, it is believed that the Appellate Court was right in its holding that the quantity of an individual employee's work affecting safety of operation was not the "true determinant" and that the Illinois Supreme Court was wrong in its holding to the contrary. However, both courts agree that Levinson fell within the Commission's authority under section 204 (a) of the Motor Carrier Act and therefore was exempt from section 7 of the Labor Act, and both rely largely on the ground that he, as an

in effect foreman thereof, was in the same position as the loaders in his gang.

Certainly Levinson, as supervisor, or foreman, planning and directing the loading, was as much engaged in work affecting the safety of operation as were the men working under him. And clearly, "on the face of things" and as shown by the Appellate Court's findings, the manner in which freight is loaded into trucks directly affects such safety.

Both of the Illinois courts refer to the Commission's report in *Ex Parte No. MC–2,* 28 M. C. C. 125, and both consider, apparently, that the Commission, by certain statements in the report, indicated the view that, in order that an employee be subject to its authority under section 204 (a) of the Motor Carrier Act and thus excepted from section 7 of the Labor Act, he must be shown to devote a substantial part of his time to work affecting safety of operation. The report in question was issued in a proceeding instituted following this Court's decision in the *American Trucking Associations Case, supra,* and for the purpose (p. 126) of determining which employees of motor carriers, in addition to drivers, perform work affecting the safety of operation and therefore are subject to the Commission's power to prescribe qualifications and maximum hours of service. Early in its report (131), the Commission, in discussing its authority generally, referred to the

Hours of Service Act (relating to railroads) administered by it, which Act, in providing that it shall be unlawful for employees actually engaged in or connected with the movement of trains to be on duty for more than 16 consecutive hours, made such provision subject to the proviso that it shall be unlawful "for an operator, train dispatcher, or other employee who, by the use of the telegraph or telephone, dispatches trains, to be on duty for more than 9 hours in any period of 24 hours." This proviso, it appears from the Commission's report, was urged in certain court cases to apply to conductors and switchmen who were shown to occasionally use the telephone to transmit orders to the engineers. However, the decisions in the cases held that the proviso was not intended to apply to employees making only such occasional use of the telephone to dispatch trains, but only to those employees whose chief duties were those of a telegraph or telephone operator or train dispatcher.[3] Based, as it says, on its study of these decisions and of this Court's decision in the *American Trucking Associations Case, supra,* the Commission concluded that it should not assert jurisdiction over employees who spend an unsubstantial part of their time in safety work, and continuing, it says:

[3] In reaching this conclusion the courts apparently relied on the particular language of the proviso and applied the rule *ejusdem generis.*

> We therefore conclude that under said section 204 (a) we have power to establish qualifications and maximum hours of service with respect only to employees who devote a substantial part of their time to activities which directly affect safety of operation. Our task is thus narrowed to determining which employees of common and contract carriers and of private carriers of property by motor vehicle, engaged in interstate or foreign commerce, fall within that category.

Both of the Illinois courts apparently considered (R. 2) that this statement of the Commission was intended to apply to an individual employee, but there is nothing in the statement requiring any such reading and, since the Commission went on to apply the same to employees as a whole in the several classes dealt with, there is no reason to believe it was setting up a rule for application to each individual employee within each such class.

Following the general discussion of its authority, the Commission, in its report, specified 3 classes of employees, other than drivers, whose activities were shown by the evidence to affect safety of operation, namely, (1) mechanics, (2) loaders, and (3) drivers' helpers. In the body of the report leading up to the ultimate findings and conclusions, the Commission discusses the evidence introduced (132–137) and, with respect to each such class of employees, points out the rea-

sons why the duties involved do affect safety of operation and also in a general way the amount of time devoted to duties so affecting such safety. As to mechanics,[4] the Commission, after mentioning that it is upon them that the primary duty rests of keeping the trucks in good and safe working condition, including the duty of keeping the lights and brakes in such condition, says that all witnesses are agreed that the work of mechanics has a direct and intimate relation to safety of operation, and it finds that mechanics devote a large portion of their time to such work. As to loaders, the Commission says that the large carriers,[5] particularly those having important operations from terminal to terminal, employ men variously called loaders, dockmen, or helpers, whose sole duties are to load and unload freight and transfer it either from one vehicle to another, or between the vehicles and warehouse; that the evidence makes entirely clear that, in order that a motor vehicle may be safely operated, it must be properly loaded (here the Commission sets forth the reasons why this is so); that the great

[4] The Commission states (132) that most motor carriers operate less than ten vehicles; that it is shown that such carriers do not employ mechanics for repair work but have the work done in commercial garages; and that it, of course, has no jurisdiction over employees working in such garages.

[5] In the case of small carriers, the Commission mentions that it is the practice to have the drivers load and unload freight and that this presents no problem because the drivers are, in any case, subject to its jurisdiction.

majority of such large carriers [6] handle freight of such size and weight that proper loading is an essential to safety of operation; and that it concludes that "loaders" devote a large part of their time to activities which directly affect such safety.

Thereafter, the Commission discusses in the same manner the class of employees within the category of drivers' helpers, including conductorettes employed by certain bus operators, whose primary duties are to see to the comfort of passengers but who, nevertheless, when accidents occur, help the driver in obtaining aid and protect the vehicle from oncoming traffic.

Near the end of the report (138–139), the Commission sets out its ultimate findings of fact. Generally described, it finds separately as to each of the classes of employees, above referred to, that they (the said mechanics, loaders and drivers' helpers) devote a large part of their time (a substantial part [7] in the case of drivers' helpers) to

[6] In this connection the Commission says in effect that, while it is true that certain carriers, particularly certain private carriers, transport only freight of such light weight that its manner of loading would not adversely affect safety, nevertheless, its study indicates that such carriers do not generally employ loaders but on the contrary the drivers (in any event subject to its jurisdiction) load and unload the vehicles.

[7] This finding in the case of drivers' helpers is shown particularly to reflect at best only a rough average. The drivers' helpers referred to do no driving, but the usual said helpers assist in the loading and unloading. Furthermore, at rail-

activities which directly affect the safety of operation. Thereafter, under the heading "conclusions of law," the Commission first defines the term "safety of operation"; its other conclusions are:

> 2. That our jurisdiction to prescribe qualifications and maximum hours of service for employees of common and contract carriers and private carriers of property by motor vehicle is limited to those employees who devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce.
>
> 3. That we have power, under section 204 (a) of said Part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above, and

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road crossings they dismount and flag the driver and they act in similar capacity at busy highway crossings and when the truck is being turned around on the highway or is emerging from a driveway. Also they assist in the changing of tires when necessary and in cases of accidents aid in obtaining help. In addition to these helpers, the Commission refers to armed guards on armored trucks and conductorettes on bus lines, whose primary duties are, in the one case, to protect the valuables and, in the other, to see to the comfort of passengers, but who also in instances of accidents aid in the obtaining of help and in other respects. In including these latter in its findings (136), the Commission says substantially that it is neither necessary nor practicable to draw fine distinctions between the employees who ride on the vehicles; for they all "to some extent at least" engage in activities which directly affect safety of operation.

that we have no such power over any other classes of employees, except drivers.

Referring to the Commission's conclusion 2, that its jurisdiction to prescribe qualifications and hours of service is limited to those employees who devote a substantial part of their time to activities which directly affect the safety of operation, it is evident from its intermediate discussion and findings that the Commission is speaking, not of individual employees, but of classes of motor carrier employees, certain of which it thereupon, in its conclusion 3, holds are subject to its authority and others of which it holds are outside its authority. That is to say, the Commission is not, by its conclusion 2, fixing a rule that each individual employee, in order to be subject to its power to prescribe qualifications and maximum hours, must be shown to have spent a substantial part of his time in safety work, but is referring to employees as a whole within the classes referred to in its report. With respect to the classes designated as "mechanics," "loaders," and "drivers' helpers," it holds (conclusion 3), that it has power to establish qualifications and maximum hours "for the classes of employees covered by" its findings 1, 2, and 3 above, and, continuing, it holds that it has "no such power over any other classes of employees, except drivers," as for example, "clerical employees" (130) and "dispatchers" (134–135), the activities of each of which it had theretofore considered generally and as a class

and had found that their work only indirectly affected safety of operation and, in the case of clerical employees, that many of them spent only an average of a few minutes a day on such work indirectly affecting safety.

As above shown, in its conclusion 2, the Commission concludes that its jurisdiction to regulate qualifications and hours of service is limited to those employees who devote a substantial part of their time to activities which directly affect safety of operation. To readily grasp the import of this, all that is necessary is to consider the conclusion from the standpoint of just what is its function in the report. Obviously its function in the report is not to serve as a guide as to whether each individual employee is or is not within the Commission's jurisdiction, but is as a conclusion leading up to and supporting the report's further conclusion 3, that the Commission has jurisdiction, or power, to establish qualifications and hours of service "for the classes of employees" specified and "has no such power over any other classes."

This showing in the report's ultimate conclusions themselves, that the Commission is speaking, not of individual employees, but of classes, is also confirmed by the reports earlier underlying discussion and findings. The Commission's earlier discussion of "mechanics and other garage workers" is illustrative of this. There (133), after referring to the fact that some carriers employ

garage workers other than mechanics, such as carpenters, tarpaulin tailors and men *who do nothing* but paint the vehicles, the Commission finds "that the work done by none of these employees affects safety of operation." [Italics supplied.] Continuing, the Commission further says:

> It is possible * * * that some of the larger carriers employ men whose *sole* duty is to see that the motor vehicles are properly supplied with oil, gas, and grease, or to wash the vehicles. In the majority of cases, *undoubtedly*, the mechanics perform this work. However, if there be employees who *do nothing* but oil, gas, grease, or wash the motor vehicles, we find that they do not perform duties which directly affect the safety of operation. To make our finding entirely clear, it is that mechanics are the only garage workers we find subject to our jurisdiction. [Italics supplied.]

By this latter statement, it is apparent that the Commission means that mechanics are the only class of garage workers over which it has jurisdiction. It had just given consideration to carpenters, painters and men who do nothing but wash, oil or grease the vehicles and had found that the work of none of these garage workers directly affect safety of operation. However, it emphasizes that, in order to be outside its jurisdiction, they must do nothing else, that is, no repair or other work of a mechanic at all. And it seems evident from this that, if even a small or

unsubstantial part of their time were devoted to repair or other work of a mechanic on the vehicles or their parts, it would regard them as included in the class designated as "mechanics" and subject to its power to regulate qualifications and hours of service. It had previously said, when discussing mechanics directly (132), that all witnesses were agreed that the work of mechanics has "a direct and intimate relation to safety of operation, and no conflicting evidence was submitted."

Furthermore, in its discussion of the class of employees called drivers' helpers (136), the Commission expressly says "that it is neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in other capacities than that of driver." Here the Commission is referring particularly to two kinds of drivers' helpers, (1) the armed guards who ride with the drivers on armored trucks and who, while primarily employed to protect the valuables transported, nevertheless, in case of accident or other emergency aid the driver in obtaining help and in other respects, and (2) conductorettes employed by certain bus lines whose duties, while primarily to see to the comfort of passengers, also include the duty, in instances where accidents occur, of assisting the driver in obtaining aid and in the protecting of the vehicle from oncoming traffic. It will be seen, particularly in the case of conductorettes, that their duties, insofar as affecting safety of

operation, are not only limited but attach only "in instances where accidents occur." While such accidents may at times occur frequently, they could not, it would seem, be always expected to be a matter of daily or even weekly occurrence. Following its statement, above quoted, that it is neither necessary nor practicable to draw fine distinctions between the various employees other than drivers who ride on the vehicles, the Commission says that—

> To some extent at least they all engage in activities which directly affect safety of operation. An attempt to limit our jurisdiction over them in accordance with the degree in which they engage in such activities would create confusion and continued controversy. They will be included in the category of helpers.

The Commission, in all that it says above and particularly its statements to the effect that, since all the employees referred to engage *to some extent at least* in activities directly affecting safety of operation, it should not attempt to limit its jurisdiction over them in accordance with the degree in which they do so, disputes practically in express language that, by its conclusion (2) at the end of the report, it is setting up a rule that, in order that individual employees fall within its jurisdiction over qualifications and hours of service, it must in every case be shown that they devote a substantial part of their time to work

directly affecting safety of operation. The language "to some extent at least" engaged "in activities which directly affect safety of operation" obviously is not used to mean engaged *to a substantial extent* in such activities; and it, in fact, reminds of the holding of the Appellate Court of Illinois (see p. 5, *supra*) to the effect that it is enough, in order to bring an employee within the Commission's authority over qualifications and hours of service, that he perform *some* work substantially affecting safety of operation.

It has been above pointed out (p. 14, *supra*) that, if the Commission's conclusions 2 and 3 at the end of its report are read together, as they must be, it clearly appears that its statement in the former, that its jurisdiction is limited to those employees who devote a substantial part of their time to safety work, refers, not to individual employees, but to employees as a whole within the classes named and discussed in the report. And this normal reading of the conclusions is, it seems evident, borne out and confirmed by the Commission's underlying discussion and findings on which the conclusions are predicated and based.

Reverting to the decisions of the Appellate and Supreme Courts of Illinois in the present case: Although those courts differed on the question of whether the quantity of (or time spent in) work affecting safety of operation was the true determinant of whether Levinson came within the Commission's authority over qualifications

and hours of service, both courts, in holding that he did, relied on the showing that he was in the same position as the loaders in his gang. As above shown, the Commission, in *Ex Parte No. MC–2, supra,* while pointing to the fact (134) that loaders are, when distributing freight properly in the vehicles, engaged in important safety work, also recognized that they did much other work, such as unloading and transferring the freight between vehicles or between vehicles and warehouses, which latter work, it is clear, the Commission did not regard as directly affecting safety of operation. In the present case, it appears (Petition for Writ, 22) that Levinson testified "that not much loading was done during his hours"; that "most of the outbound freight was done at night, while he worked mostly days"; but that, however, "whatever took place was under his direct charge." On the other hand, the defense testimony was "that inbound and outbound freight was equally divided during the day—inbound usually during the night and out-bound between 8 A. M. and midnight."

The Appellate Court states that thus there was a dispute in the testimony, and it does not appear that it attempted to resolve the dispute, but that, instead, it relied upon its ruling that, if some, or any, part of an employee's time is devoted to work which substantially affects safety of operation, that is enough to bring him within the Com-

mission's authority over qualifications and hours of service and thus except him from the overtime pay provisions of the Labor Standards Act. Relying in part, apparently, on Levinson's testimony that, while not much loading was done during his hours, whatever took place was under his direct charge, the Appellate Court says that there is no question that some part of Levinson's work week was devoted to the direction and supervision of the loading; that there is no question either that the loaders in his gang were exempted from Section 7 of the Labor Act; and that, therefore, it thinks that, with greater force, Levinson, who planned and directed the loading was exempt.

Levinson, in his petition for writ of certiorari, does not question that some part of his time was devoted to the direction and supervision of the loading but he excepts (p. 6) to the court's holding that the loaders in his gang "were exempt from Section 7 and that, therefore, with greater force he came within the exemption, because there was no issue, evidence, stipulation or finding in the record that the loaders were exempt." However, it appears that, under Illinois law, the Appellate Court may make findings independent of the trial court and, as shown in the Appellate Court's opinion, there was convincing evidence that the manner in which loading is done substantially affects safety of operation. Accordingly, assuming the correctness of the court's view that

the exemption applies if some part of an employee's time is devoted to work which substantially affects such safety, it is apparent that the court was within its authority in finding that the loaders in Levinson's gang were exempt. If Levinson devoted some of his time to such work it would seem to follow that the men in his gang did also. Moreover, it appears from Levinson's petition (p. 12) that the trial court found that the *major* portion of his work did not affect safety of operation and also (p. 13) that Levinson, in contesting respondents' appeal to the Appellate Court, contended, among other things, that the *major* part of his duties did not affect such safety. Both the said finding of the trial court and Levinson's contention before the Appellate Court may be said to have at least carried the import that some part of Levinson's duties did affect safety of operation.

As already mentioned, the Supreme Court of Illinois, although holding (R. 62–64), contrary to the Appellate Court, that "the true determinant" was not whether an employee performs some, or any, duties which substantially affect the safety of operation but was whether a substantial part of his duties affect such safety, nevertheless, affirmed the judgment of the Appellate Court on the ground that the latter had found that Levinson was in the same position as the loaders in his gang. As to this the Court said (R. 64):

> The Appellate Court found that the loaders in appellant's gang were exempted from section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading effecting the safety of operation.
>
> The substantial effect of the comment of the Appellate Court was to effect that the quantity of plaintiff's activity was not the true test of exemption from the Fair Labor Standards Act, yet said court did hold the appellant was in the same position as the loaders.
>
> The Appellate Court may be in error in the reason given for its judgment, but, under the facts as found by the court, the employee came within the same exemption as loaders, dockmen and helpers.

From the above it is evident that the higher court considered that, despite the view of the Appellate Court that the quantity of Levinson's activity was not the true test of exemption, nevertheless its findings did in fact embrace what it (the reviewing court) regarded as necessary. It had said (R. 63) that, under the State law, the Appellate Court might make findings of fact different from those of the trial court which must be accepted so long as they "sufficiently appear in the opinion or in the final judgment, or from an examination of the two" together. The Appellate Court had the record before it and, as stated by the higher court, it did find that the loaders in

Levinson's gang were exempted from section 7 of the Labor Act and that appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation. But, having the Appellate Court's other findings in mind, it is not clear that its findings, or conclusions, to which the higher court points, did in fact embrace findings that, either the work of Levinson, or that of the loaders in his gang, was, in substantial part (R. 64), work affecting the safety of operation.

However, this may be, it is believed that the Appellate Court's view as to the true test of exemption from the Labor Act, applied as it is to an individual employee, is correct; that that court's opinion is in this respect in substantial accord with the Commission's report in *Ex Parte No. MC--2, Supra,* and that its decision is in other respects entirely sound.

The Appellate Court's holding that, where an employee performs work which substantially affects safety of operation, he is, regardless of its quantity, subject to the Commission's authority over employee qualifications and hours of service, is entirely sound and correct

In addition to the fact that it is considered that the view of the Appellate Court as to the true test of exemption from the Labor Act is in substantial accord with the Commission's report in *Ex Parte No. MC-2, supra,* it is believed that consideration of the statutes and of this Court's de-

cisions shows that that view, rather than the view of the Supreme Court of Illinois, is correct and in accord with the purposes of Congress.

However, before discussing these considerations, it is desired to emphasize that the Commission does not agree with the allegations in the petition (pp. 8, 11) to the effect that questions of what employees are subject to its authority under section 204 (a) of the Motor Carrier Act are questions committed to it for determinations of administrative finality or that they are in fact committed to it at all, except in the sense that, as and when they arise in performing its duties, it may *incidentally* determine them. Cf. *Tex. & Pac. Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 272. For one thing, there are two administrative bodies here involved, and it will be realized that the Wage-Hour Administrator, in performing his duties under the Labor Act, meets with, and must also *incidentally* determine the identical questions. Although it is true that final determination in any case that certain employees are, or are not, subject to the Commission's authority under the said section of the Motor Carrier Act is determinative of whether or not they are exempt from section 7 of the Labor Act (*Southland Co.* v. *Bayley*, 319 U. S. 44, 48–49), nevertheless, neither the Commission's incidental (i. e., quasi-judicial) determination of their status under the Motor Carrier Act, nor that of the Wage-Hour Administra-

tor, is in any sense final except as sustained by the courts.

As above mentioned, while this Court, in the *American Trucking Association* case, *supra,* said that the interpretation and meaning which the Commission and the Wage and Hour Division of the Department of Labor had placed on section 204 (a) of the Motor Carrier Act (referred to in the exemption provision, sec. 13 (b) (1) of the Labor Act) were entitled to great weight (549), it also made plain (544) that, except for the rule according weight to the views of administrative bodies, such "interpretation of the meaning of statutes, as applied to judicial controversies, is exclusively a judicial function." Although, in certain court cases brought, as is the present one, under section 16 (b) of the Labor Act, it has been urged [8] that the particular question (involved in the general question of jurisdiction) of what kinds of work affect safety of operation is committed by Congress to the Commission, the statutes involved in no way indicate that that is the case (Cf. *Shields* v. *Utah-Idaho R. R.,* 305 U. S. 177, 181–182; *Gray* v. *Powell,* 314 U. S. 402), but, on the contrary, the Labor Act, by the very fact that it authorizes actions, wherein determinations of the question are necessary, to be brought directly in court, shows plainly that such determinations are placed with the courts and withheld from the ad-

[8] It was so held in *Ispass* v. *Pyramid Motor Corp.,* 59 Fed. Supp. 341.

ministrative bodies, that is, as determinations of administrative kind and finality.[9] *Shields* case, *supra*, p. 185; *Powell* v. *United States*, 300 U. S. 276, 287–288; *United States* v. *Idaho*, 298 U. S. 105. Moreover, the question of what kinds of work affect safety of operation is here a part of the function of interpreting the meaning of the statutory provisions involved and, although in the case of rate tariffs there is, as asserted in the cases mentioned, an exception to the rule that the function of interpreting written instruments is for the courts, such exception applies only to tariff questions which are particularly intricate and involve words of peculiar and unusual meaning. *Standard Oil Co.* v. *United States*, 283 U. S. 235. And further, the exception in the case of the carriers' tariffs is practically compelled by the rate uniformity rule, that is, the Interstate Commerce Act's fundamental purpose to stop all rate dis-

[9] True there are court cases, where the courts, finding that *in fact* administrative questions are involved, refer the same to the Commission or other administrative body (*General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422), but here, in the very statute containing the exemption provision Congress has authorized the court actions in which the questions arise and thus plainly has left the questions as mixed questions of law and fact for the courts and has not made of them questions requiring prior administrative determination. As further indicative of its purpose in this respect, it is perhaps also significant that Congress, in authorizing the court actions, appears to have had in mind convenient forums for the parties, in that it provided that they might be brought in any court of competent jurisdiction.

criminations and to require equality of rates in all cases.

However, while, as regards the jurisdictional questions here involved, neither the Commission's rulings nor those of the Wage-Hour Administrator, are administratively final on the courts, the views of the Commission, as shown in its report, that the work of that class of motor carrier employees designated as "loaders" directly affects the safety of operation of the carriers' vehicles on the highways appears hardly open to question, and, accepting as established that such work does in fact directly affect such safety, it seems clear that, regardless of the amount of time devoted to the work by an individual loader (or loader foreman), he is expected to be fitted, and in fit condition, to perform it when the occasion arises and therefore intended to be subject to the Commission's authority over qualifications and hours of service.

It is realized that it might be urged, or argued, that, if, in the case of particular employees of a class performing work which directly affects safety of operation, it is true that the Commission's authority attaches regardless of the amount of time devoted thereto, then this would be equally true of the class itself, that is, that the Commission's authority would attach even though the time spent in such work by the employees of the class as a whole was unsubstantial. But it will be seen that a real distinction exists. The Com-

mission, in *Ex Parte No. MC-2* was not considering the status of particular employees but was determining, with respect to the several classes of employees of motor carriers, other than drivers, whether its authority to establish regulations of *general application* attached and applied. In determining this question, the Commission considered that, where it was shown that employees of a class as a whole spent only an unsubstantial part of their time in work affecting safety of operation, it was not expected to assert, as to such class, the authority given it to regulate qualifications and hours of service. But, while that view appears sound in the case of employees of a class as a whole, it in no way follows that, in order that a particular employee (of a class clearly subject thereto) be within the Commission's said authority to establish regulations of *general application*, he must individually be shown to devote a substantial part of his time to work which directly affects such safety. It must be considered that Congress, in clothing the Commission with authority of such kind, intended that it should be applied in a way that would give to it a practicable "working" in effectuating its remedial purpose of promoting safety on the highways, and that it did not, as in effect said by the Commission (136), intend that fine distinctions be drawn between the various employees within a class where all are "to some extent at least"

engaged "in activities which directly affect safety of operation."

Furthermore, it should be kept in mind that, so far as the text of section 204 (a) of the Motor Carrier Act is concerned, the authority given the Commission applies to the employees of common and contract motor carriers[10] without any limitation or qualification whatever. Although, having in mind the purpose of the statutory provision to promote safety of operation, it is plain that it has no application with respect to clerical or other classes of employees whose work, if affecting such safety at all, only remotely or indirectly does so, nevertheless, where the classes under consideration consist of employees such as drivers, drivers' helpers, loaders, and mechanics, whose work obviously has direct relation to such safety and who plainly, as employees of a class, as a whole spend either a large, or a very considerable part of their time in such work, then and in such case, it would seem that the sweep of the language of section 204 (a)—the fact that literally it applies to all of the carriers' employees—considered together

[10] This is not true of private carriers, for, as to them, section 204 (a) (3) expressly provides that the authority given the Commission to prescribe qualifications and hours of service of employees is to the end of promoting safety of operation. But the significance of this, if any at all, would be that it serves to emphasize rather than otherwise that no limitation as to purpose is in terms imposed on the like authority given the Commission in respect of the employees of common and contract carriers.

with the fact that the authority conferred on the Commission is authority to establish regulations of general application,[11] affords strong reason for a construction thereof which would not "draw fine distinctions between the (quantity) of the work done by the various employees" within a class, but would enable its practicable application and the effective carrying out of the statute's purpose.

As above said, it is evident that, where the work of an employee does directly affect safety of operation, he is, regardless of the amount of time devoted thereto, expected by the statute to be fitted, and in fit condition, to perform it whenever the occasion arises and therefore intended to be subject to the Commission's authority over qualifications and hours of service. As illustrative of this, the Commission's report in *Ex Parte No. MC–2, supra,* in discussing the evidence as to mechanics (132), refers to the importance of their duties in checking, and adjusting if necessary, the brakes and headlights of motor vehicles. Even assuming that, in instances of particular employees, such duties occupied only a few minutes daily of their time, still, if because of excessive hours they are

[11] Cf. *Assigned Car Cases*, 274 U. S. 564, 583. While the Court's holding in this case as to the Commission's broad authority in establishing rules or regulations of general application relates to the formulating of the rules rather than to the interpretation of the provision conferring the authority, still the basis for such authority is, similarly as the reason here, to enable a practicable and effective application and use of the authority conferred.

overfatigued when called upon to examine, or adjust, brakes or headlights, it is evident that the work might be carelessly, or inattentively, done.[12] And further in this connection, and in connection with the rule that remedial statutes are to be liberally, and not narrowly, read, it is certainly the fact that there could be few remedial purposes, in the interest of the general public, more compelling than Congress' purpose here of promoting safety on the highways.

This brief, in its discussion so far of the case before the Court, has been particularly directed to the decisions of the Appellate and Supreme Courts of Illinois, the former of which it is believed and submitted is in all respects sound. However, since the petitioner, Levinson, is seeking to have the appellate courts reversed and the trial court sustained, and the Commission is not in accord with his contentions, it seems necessary to refer briefly to the particular respects in which it is believed that the trial court was in error.

Speaking of the trial court's decision and Levinson's contentions, the opinion of the Appellate Court says (petition, p. 21) that the latter relies

[12] In the *American Trucking Association Case*, *supra*, this Court, in holding that the Commission's authority under section 204 (a) was limited to those employees whose work affected safety of operation, referred to no further limitation, conditioning the Commission's authority over an employee on the amount of time he devoted to work affecting such safety.

mainly upon *Anuchick, et al.* v. *Trans-American Freight Lines,* 6 Labor Cases (U. S. Dist. Ct., E. D. of So. Michigan) No. 61,245, and that—

> * * * In the *Anuchick case,* the court found that certain employees devoted a *substantial part* of their time to work not directly affecting safety of operation and, on the theory that it was bound by the Department of Labor's interpretation of the term "substantial" in Bulletin No. 9, gave judgment for the employees. The interpretation in Bulletin No. 9 then prevailing was that "substantial" meant in excess of 20% of duties not connected with *loading and unloading.* Bulletin No. 9, as revised to October 1943, modifies the earlier interpretation to mean "the *greater part* of his time during any work week on non-exempt activities." We assume the court in the *Anuchick case* would have accepted this later interpretation had it then been effective and unless the employees there spent the *greater part* of their time on duties not directly affecting safety, would have held against them. These various interpretations suggest the difficulty of finding the proper rule here. The trial court apparently applied the later interpretation of the Department of Labor.

As indicated by the above, the judgment of the trial court in the present case does not directly show whether or not, in reaching its decision, it applied the interpretation of the Department of

Labor, or whether, if doing so, it considered that it was bound by the interpretation. But, however this may be, it clearly appears that the trial court, in holding that Levinson was not excepted from the overtime pay provisions of the Labor Act, based such holding on its finding that the greater, or major, portion of his work did not affect safety of operation. It would therefore seem that the criterion followed by the court was one predicated upon a balancing of the amounts of safety and non-safety work done by an employee, and which assumed that, where that portion of his work not affecting safety of operation was the greater in amount, he was not subject to the Commission's authority over qualifications and hours of service under the Motor Carrier Act and consequently exempt from the overtime provisions of the Labor Act, but was covered by the latter.

But the exemption clause of the Labor Act (sec. 13 (b). (1)) does not provide for a balancing or measuring of the safety and non-safety work performed by an employee in order to determine whether he is subject to the one Act or to the other. On the contrary, it provides that the overtime provisions of the Labor Act "shall not apply with respect to any employee with respect to whom the Commission has power (under the Motor Carrier Act) to establish qualifications and maximum hours of service." And it thus leaves the question of exemption from the Labor

Act to be determined solely by whether the employee is subject to the Commission's said authority under the Motor Carrier Act. As said by this Court in *Southland Co.* v. *Bayley*,[13] 319 U. S. 44, 47 (a case instituted by drivers in the employ of a private carrier):

> * * * Section 13 (b) (1) exempts from the maximum hour limitation of the Fair Labor Standards Act those employees over whom the Interstate Commerce Commission "has power to" prescribe maximum hours of service. Section 204 (a) (3) certainly gives "power to the Commission to establish maximum hours for the employees here involved."

And, in this connection the following statement of the Court on the succeeding page is pertinent, to wit:

> * * * By exempting the drivers of motors from the maximum hour limitations of the Fair Labor Standards Act, Congress evidently relied upon the Motor Car-

[13] In this case (involving an action for overtime pay brought by employees of a private carrier), it was contended that, since the Commission had not as yet found that there was need to establish qualifications and hours of service (a finding specified in section 204 (a) (3)), it did not have the "power" to establish them in a sense having the effect of exempting employees from section 7 of the Labor Act. The Court, however, based on the reasons given in its opinions, held that, while the "power" referred to in sec. 13 (b) could not be exercised until the finding was made, it had nevertheless been in existence since the enactment of the Motor Carrier Act in 1935.

rier provisions to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime.

Not only does the language of section 13 (b) (1) indicate this Congressional purpose but what slight evidence there is from the legislative history points to the same conclusion. The amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers. * * *

While the above speaks only of drivers and refers to the fluctuating hours of such class of employees, nevertheless, it appears to be based principally on the language of the exemption clause in section 13 (b) (1) and, therefore, presumably applies to "any employee with respect to whom the Commission has power to establish qualifications and maximum hours of service." As stated by the Court, section 204 (a) (3) certainly gives such power to the Commission over drivers, and it is believed that the Commission clearly also has such power over "loaders" and the other classes of employees specified in its report in *Ex Parte No. MC–2, supra.*

As above pointed out, section 204 (a) of the Motor Carrier Act implements its purpose to promote safety on the highways by the authority conferred on the Commission to regulate employee qualifications and hours of service. Accordingly,

it is apparent that, where the work of an employee directly affects safety of operation, he is, regardless of the amount of time devoted to such work, expected by the statute to be both qualified and in fit condition to perform it whenever the occasion arises. The intention that he be qualified plainly applies in all cases where the work of an employee directly affects such safety, and it is evident, of course, that overfatigue from excessive hours may result, not only from that part of such employee's work affecting safety of operation, but also from that part not affecting such safety.

Respectfully submitted.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

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No. 1391 22

In the Supreme Court of the United States

OCTOBER TERM, 1945

MAX LEVINSON, PETITIONER

v.

SPECTOR MOTOR SERVICE, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

MEMORANDUM FOR THE SOLICITOR GENERAL AS AMICUS CURIAE

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 139

MAX LEVINSON, PETITIONER

v.

SPECTOR MOTOR SERVICE, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

MEMORANDUM FOR THE SOLICITOR GENERAL AS AMICUS CURIAE

The question in this case is whether a person working less than half the time as a loader of trucks comes within the exemption in Section 13 (b) (1) of the Fair Labor Standards Act for "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act." The Court has requested the views of the Interstate Commerce Commission and of the Solicitor General, and this memorandum is submitted by the Solicitor General pursuant to that request.

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We agree with the construction of the Motor Carrier Act set forth in the brief *amicus curiae* being filed on behalf of the Interstate Commerce Commission. The Commission argues that if a person is engaged in operations relating to safety for any time at all, it has some power over him, and that this result is necessary if dangerous driving by tired drivers who work long hours performing other services and spend only a short time in driving is to be avoided.[1] If the answer to the question as to the construction of the Fair Labor Standards Act is to be found exclusively in the Motor Carrier Act, the employment here involved would in our view be exempt. The consequences of not taking the purposes of the Fair Labor Standards Act, as well as those of the Motor Carrier Act, into account are such, however, as to make us reluctant to suggest that the case may be disposed of so easily. See *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, 47; *United States* v. *American Trucking Associations*, 310 U. S. 534, 542.

The Interstate Commerce Commission has held that loaders are subject to the Commission's jurisdiction under Section 204 of the Motor Carrier

[1] Since the issue here relates to the applicability of the exemption from Section 7 of the Fair Labor Standards Act, which operates on a work-week basis, we assume that the Section 13 (b) (1) exemption would clearly not apply in a work-week where the employee performed no work subject to the power of the Interstate Commerce Commission.

Act because a truck improperly loaded (too heavily on one side or end or at the top) would be dangerous on the highways. *Maximum Hours of Service of Motor Carrier Employees,* 28 M. C. C. 125, 133–134. Although this may be so, the relationship between the hours worked by loaders and highway accidents seems very tenuous: See *Walling* v. *Comet Carriers,* 151 F. 2d 107, 110 (C. C. A. 2), pending on petition for certiorari, No. 609.[2] Congress clearly had drivers in mind when the legislation here in question was enacted, as the review of the legislative history in the opinion of this Court in *United States* v. *American Trucking Associations,* 310 U. S. 534, indicates. Moreover, although the Commission has asserted power over loaders, it has never in the 10 years since the Motor Carrier Act was passed sought to prescribe any maximum hours for employees other than drivers.[3] The situation thus differs from *Southland Gasoline Co.* v. *Bayley,* 319 U. S. 44, inasmuch as Congress assumed correctly that the Commission would es-

[2] See also the dissenting opinions of Commissioners Splawn and Patterson, 28 M. C. C. at 140–141.

[3] The Commission has asserted power over mechanics, leaders, and drivers' helpers, in addition to drivers. *Maximum Hours of Service of Motor-Carrier Employees,* 28 M. C. C. 125, at 132–135, 138–139. The Commission has established a maximum of sixty hours per week for drivers. *Maximum Hours of Service of Motor Carrier Employees,* 3 M. C. C. 665, 690–692.

tablish maximum hours for drivers, the class involved in that case.

If to this is added the fact that particular employees may work only a small proportion of their time performing work in which the Commission has any interest under the Motor Carrier Act, the relationship between what that employee does and what Congress had in mind in the Fair Labor Standards Act exemption seems remote indeed. Although there is no explicit legislative history on the point, we believe that Congress would not have intended the exemption to reach employees who work an insubstantial portion of their time in work with respect to which the Interstate Commerce Commission has fixed no maximum hours, and as to which there might be a question regarding its power to do so.

The consequence of allowing an exemption from the Fair Labor Standards Act in such cases would also be serious in that it would open an easy avenue of evasion. An employer could readily assign employees primarily engaged in other activities to loading, repair work, or "helping" for a very short time each week, and thus subject them to the unexercised "power" of the Interstate Commerce Commission for the sole purpose of avoiding any regulation of hours whatsoever.

We find it difficult to reconcile the sensible interpretation of the law which we believe is most

consistent with the legislative policy with the literal meaning of the words of the Fair Labor Standards Act. The literal construction, however, produces a result which seems absurd enough to warrant resort to the doctrine of *Holy Trinity Church* v. *United States,* 143 U. S. 457. As this Court has said in dealing with a similar problem with respect to the very statutory provisions involved here, when the plain "meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States* v. *American Trucking Associations,* 310 U. S. 534, 543.

The construction of the exemption as not extending to employees who work an insubstantial proportion of their time in activities subject to the power of the Interstate Commerce Commission is in accordance with the view of the Illinois Supreme Court in this case and with that of the Circuit Court of Appeals for the Second Circuit in *Walling* v. *Comet Carriers,* 151 F. 2d 107, 111, pending on petition for certiorari No. 609. To the same effect see *Davis* v. *Southern California Freight Lines,* 8 Wage Hour Reporter, 1151 (S.

D. Calif. Nov. 1945) and *Walling* v. *Griffin Cartage Company*, 62 F. Supp. 396, 400 (E. D. Mich).*

The question whether a particular employee has worked such a substantial portion of his time in services related to safety of operation as to bring him within the intent of the exemption raises the usual problems inherent in drawing lines. The Administrator, in order to establish a definite guiding criterion for the practical administration and enforcement of the Act, has interpreted the exemption as drawing a line at the 50% point; only employees who work at least 50% of the time performing services subject to the power of the Interstate Commerce Commission are regarded as exempt. Interpretative Bulletin No. 9 (revision of October 1943), paragraph 4. This interpretation was adopted following "the well-considered opinion" of the court in *Hutchinson* v. *W. C. Barry, Inc.*, 50 F. Supp. 292 (D. Mass.). See *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337, 340 (C. C. A. 6). Cf. *Anuchick* v. *TransAmerican Freight Lines*, 46 F. Supp. 861 (E. D. Mich.), holding that an employee who spent more than 20% of his time in work which did not affect safety operations was not within

*This construction does not result in any conflict between the operations of the two statutes or withdraw the employees from the jurisdiction of the Commission. The requirement as to the payment of overtime for hours in excess of 40 per week is in no way incompatible with compliance with any maximum hours the Commission may prescribe.

the exemption. Although it is difficult to discover support in the statute for the drawing of any such mathematical line, the Administrator's standard has practical advantages and was apparently deemed a reasonable one for accomplishing the purpose of the exemption, in *Walling* v. *West Kentucky Coal Co.*, 8 Wage Hour Reporter 179 (W. D. Tenn.), and *Walling* v. *Gordon's Transports*, 8 Wage Hour Reporter 838 (W. D. Tenn.); see also *Hutchinson* v. *W. C. Barry, Inc.*, *supra*. Contra: *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C. C. A. 2), pending on petition for certiorari, No. 609; *Crean* v. *Moran Transportation Lines*, 57 F. Supp. 212 (W. D. N. Y.) Cf. *Keegan* v. *Ruppert*, 6 Wage Hour Reporter 676 (S. D. N. Y. 1943); *Potashnick Local Truck System* v. *Archer*, 179 S. W. 2d 696 (Ark.).

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

DECEMBER 1945.

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Nos. 22 and 41

In the Supreme Court of the United States

OCTOBER TERM, 1946

MAX LEVINSON, PETITIONER

v.

SPECTOR MOTOR SERVICE, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PYRAMID MOTOR FREIGHT CORPORATION, PETITIONER

v.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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No. 22

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No. 41

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v.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

At the last term, before the first argument of the *Levinson* case, the Court requested the views of the Interstate Commerce Commission and of the Solicitor General on the questions raised. The Interstate Commerce Commission filed a brief and the Solicitor General a short memorandum

which took a position somewhat between that of the Commission and that of the Wage and Hour Administrator. Inasmuch as the Interstate Commerce Commission has set forth its views in full, it seems desirable to give the Wage and Hour Administrator an equal opportunity. Accordingly, I am authorizing the filing of this brief on his behalf. The position taken, though not the same, is quite close to the one previously advanced in the Solicitor General's memorandum.

J. HOWARD MCGRATH,
Solicitor General.

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The petitions raise the following questions of importance in the interpretation of the Fair Labor Standards Act:

1. Whether employees engaged in the loading of motor vehicles for interstate transportation are engaged in activities which affect safety of operation so as to bring them within the jurisdiction of the Interstate Commerce Commission under Section 204 of the Motor Carrier Act.

2. Whether employees who spend the greater part of their time in activities which do not affect safety of operation are exempt from the overtime provisions of the Fair Labor Standards Act by virtue of Section 13 (b) (1) of the Act.

STATEMENT

No. 22

Respondent is engaged in the motor transportation of freight in interstate commerce (R. 42). Petitioner was employed by respondent as a foreman and checker (R. 15, 28). The handling of freight at respondent's terminal is usually performed by gangs of three or four men which include a checker (R. 13–14). In unloading inbound freight, the checker compares the freight against the invoices, makes the appropriate notation if the shipment is correct, and determines where the wheeler is to place the freight in the terminal (R. 14, 15). In loading outbound freight, the checker compares the invoice with the pieces loaded and determines the distribution of the weight in the truck (R. 14, 16, 49). Petitioner performed the usual tasks of a checker described above and also numerous other duties such as obtaining an application, a time card, and a social security card from new employees, approving time cards of resigning employees and supervising the proper recording of time off, correcting bills for mistakes in the weight or designation of freight, executing leases under which local carriers hauled freight for respondent, and making out reports when a shipment of freight was over, short or damaged (R. 16–18).

Although petitioner perfotmed some work in connection with the loading of interstate trucks,

the trial court found that "the major portion" of his 87-hour workweek was spent in nonloading and clerical activities which "did not affect the safety of defendant's operations" and, therefore, that he was not exempt from the overtime provisions of the Act (R. 11). The Appellate Court, stating that "some part of plaintiff's workweek was devoted to the direction and supervision of the loading of interstate motor freight carriers," reversed on the ground "that the true determinant is whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial." (Petition, p. 23.) The Supreme Court of Illinois disagreed with the Appellate Court, holding that "the true determinant is * * * whether the duties affecting the safety [of operations] are substantial," but affirmed the judgment for respondent on the ground that a substantial part of petitioner's work related to loading which affects safety of operation of motor vehicles (R. 62–64).

No. 41

Respondent is a common carrier engaged in the interstate transportation of freight by motor vehicle (R. 31–32). Respondents were employed by petitioner in handling freight at its terminals located in the "garment center" in New York City. They received incoming freight as it was pushed over the tailboard of the truck by the

helper on the truck, and placed this freight in petitioner's subterminal building or at a convenient spot on the street in the vicinity of the subterminal. They then delivered this freight to the various consignees by means of hand trucks. Respondents also participated in the loading of outgoing trucks. They would pick up freight packages at the places of business of the various consignors in the garment center, deliver the freight by hand trucks to the outgoing trucks waiting either at the subterminal or on the public streets in the garment center and then physically load the waiting trucks by lifting the packages onto the tailboards of the trucks. When the weight or size of the package so required they would stand inside the truck bodies and assist in stacking the freight in the vehicle (R. 26). After they were loaded, the trucks took up their journey first to petitioner's main terminal and then, with a new driver, on to destinations south of New York. (R. 25–26.)

The district court was of the opinion that whether respondents' activities affected safety of operation was for the Interstate Commerce Commission to decide and it held the case in abeyance so that respondents might apply to the Commission to fix their status (R. 39). Thereafter respondents moved for a final disposition of the case (R. 40), and the district court, treating the motion as an election not to apply to the Commission or to present further pleadings or proof, dismissed the

complaint (R. 50–51). The court of appeals reversed as to all of the respondents except one on the ground that "the defendant has not carried the burden of showing that 'loading' occupies a substantial part of the working time of the plaintiffs" (R. 67). The court held that employees who spend an unsubstantial part of their time in activities affecting the safety of operation of motor vehicles are not subject to the jurisdiction of the Interstate Commerce Commission and not exempt from the overtime provisions of the Fair Labor Standards Act.

ARGUMENT

I

THE CORRECTNESS OF THE INTERSTATE COMMERCE COMMISSION'S DETERMINATION THAT EMPLOYEES ENGAGED IN LOADING ARE WITHIN ITS JURISDICTION IS SUBJECT TO CONSIDERABLE DOUBT

Section 13 (b) (1) of the Fair Labor Standards Act exempts from Section 7 "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 * * *." This Court held in *United States* v. *American Trucking Assns.*, 310 U. S. 534, 553, that the jurisdiction of the Commission under Section 204 "is limited to those employees whose activities affect safety of operation" in interstate transportation. Following that decision, the Commission held hearings to determine what activi-

ties, other than driving, affect safety of operation, and issued a report expressing the view that the duties of loaders, drivers' helpers and mechanics, as well as drivers, were within that category. It made no finding, however, that the hours of the non-driving employees affected safety of operation. The opinion of the Commission explained its conclusion that loading of motor vehicles affects the safety of their operation on the highways as follows:

> If more weight is placed on one side of the vehicle than the other, there is a tendency to tip when rounding curves. If more weight is placed in the rear of the vehicle, the tendency is to raise the front wheels and make safe operation difficult. Further, it is necessary that the load be distributed properly over the axles of the motor vehicle. (*Ex Parte No. MC–2*, 28 M. C. C. 125, 134.)

Because the question relates principally to the exercise of powers under the Motor Carrier Act, the Administrator has followed the Commission's interpretation that employees engaged in loading are within its jurisdiction.[1] Since the correctness of this interpretation, however, may be considered by this Court, the Administrator believes it appro-

[1] See Interpretative Bulletin No. 9, par. 4, March 1939, revised October 1943, issued by the Administrator of the Wage and Hour Division, United States Department of Labor. The full text of this bulletin is set forth in the appendix to this brief.

priate to discuss certain factors which suggests that the Commission's power under the Motor Carrier Act does not extend to the regulation of loaders.

We shall show that the action of the Commission in proceedings before the enactment of the Fair Labor Standards Act, the legislative history of that Act, and the views expressed by some of the Commissioners themselves after its enactment, all contain evidence that loaders are not within the purview of the Motor Carrier Act. As we have seen, this Court has held that the Commission's power of regulation is limited to activities which affect safety of operation. The clear implication of this holding is that the power to regulate exists only if its exercise will affect safety of operations. Thus the Commission has power to regulate the hours of loaders only if the regulation of these hours affects safety. The Commission took this view of its own authority in December 1937 when it stated it would "limit our regulations concerning maximum hours of service to those employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations." *Ex Parte No. MC–2*, 3 M. C. C. 655, 667. In determining the scope of the Commission's power in *United States* v. *American Trucking Assns., supra,* at 549, the above language was quoted by this Court with approval as a recognition by the Commission "that its authority was limited to securing safety of operation." In this

light, the evidence is strong that the hours worked by loaders do not directly[2] affect safety of operation[3] and, therefore, that the power to regulate them does not exist.

In its initial proceedings in 1936 pursuant to Section 204 of the Motor Carrier Act, the Interstate Commerce Commission dealt with the "qualifications" but not "the maximum hours of service" of motor carrier employees and prescribed regulations with respect to qualifications of drivers only. *Ex Parte No. MC–4*, 1 M. C. C. 1, 18–20. In a later proceeding in 1937 "for the purpose of ascertaining the facts respecting the hours of service of employees in motor carrier transportation and, if necessary, of prescribing regulations with respect to maximum hours of service," the Commission found that the long hours drivers were required to be on duty were

---

[2] The Commission apparently construes its jurisdiction under Section 204 as limited to employees whose activities *directly* affect safety. Cf. the Conclusion of the Commission in *Ex Parte MC–2*, 28 M. C. C. 125, 131, that "under said section 204 (a) we have power to establish qualifications and maximum hours of service with respect only to employees who devote a substantial part of their time to activities which *directly* affect safety of operation" (emphasis supplied).

[3] The difference between the effect of long hours on driving and loading may be readily illustrated. If a tired driver falls asleep, an accident is almost certain to result, but no danger results from a loader falling asleep. Nor does loading appear to be so intricate an activity that it cannot be properly performed by a fatigued employee. He may have difficulty in lifting the load but, having done so, he is not likely to be unable to place it properly in the truck.

"dangerous *per se*" and "cause unnecessary hazard to the operation of such motor vehicles." *Ex Parte No. MC–2*, 3 M. C. C. 665, 666, 674, 690. Regulations were prescribed with respect to maximum hours but were again limited to drivers. *Id.*, 690–693.[4] It is significant that in this proceeding the Commission was requested to prescribe maximum hours of service of mechanics and machinists employed by carriers on the ground, among others, "that long hours are worked [by these employees] and that such hours contribute to unsafe operation of vehicles." *Id.*, 667–668. Without discussing whether or not long hours were in fact worked, the Commission rejected this request finding that there was no evidence that the hours worked "result in unsafe condition of equipment." *Id.*, 668.

This was the state of the Commission's action when the Fair Labor Standards Act was enacted. Thus, when Section 13 (b) (1) was adopted as an amendment to the Act, "the Senate at least was aware of the Commission's investigation of its powers" (*United States* v. *American Trucking Assns.*, 310 U. S. 534, 549–550; 81 Cong. Rec. 7875) and presumably knew that the Commission

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[4] The first regulations with respect to maximum hours of service of drivers applied only to vehicles operated by common and contract carriers (*Ex Parte No. MC–2*, 3 M. C. C. 665, 690–693, modified by 6 M. C. C. 557, 566, 568, 11 M. C. C. 203, 212–214) but subsequently were extended to drivers of private carriers. *Ex Parte No. MC–3*, 23 M. C. C. 1, 42.

had found that only hours of drivers affect the safety of operation. The Senate debates clearly indicate that the sponsors of both the bill and the exemption provision considered the Commission's power to prescribe qualifications and maximum hours of service to be limited to drivers. In proposing the amendment, Senator Moore stated, "It refers to the drivers of busses." Senator Black then explained:

> Mr. President, it was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such way as not to conflict with such regulation. That action was taken with reference to maritime workers. It was taken with reference to railroad workers insofar as they were governed by the Hours of Service Act.
>
> The amendment of the Senator from New Jersey [Mr. Moore] would apply the same principle to *truck drivers* insofar as hours of labor are concerned. It is my understanding that the hours have been regulated by the Interstate Commerce Commission recently.
>
> Mr. MOORE. Yes; it has been done during the present month.
>
> Mr. BLACK. That has occurred since the hearings before the committee. The committee were of the opinion, when we originally took up the bill for consideration, that it was exceedingly important that the

> long hours of *truck drivers* should be regulated in the interest of public safety. That had not been done by any other governmental agency at the time of the hearings. Consequently the amendment was not adopted by the committee. [Italics supplied.]

As already indicated, in March 1941, several years after the passage of the Fair Labor Standards Act, the Commission concluded that the activities of loaders, mechanics and drivers' helpers, in addition to drivers, directly affect the safety of operation of the vehicles on the highways and, consequently, that these employees are within the regulatory power of the Commission. *Ex Parte No. MC–2*, 28 M. C. C. 125. It may be noted, however, that this conclusion was reached notwithstanding the Commission's express acknowledgment of "the fact that poor loading is the cause of relatively few highway accidents." 28 M. C. C. at 134. Commissioner Splawn strongly dissented from the conclusion that the Commission had jurisdiction over loaders or any other employees "whose activities are far removed from the actual operation of the vehicle on the highway." 28 M. C. C. at 140. In support of his view he pointed to the inconsistency between the Commission's present conclusion and its original refusal to prescribe maximum hours of service for mechanics, as well as to the legislative history of the Motor Carrier Act. His dissent from the

Commission's conclusion that such activities affect safety was joined by Commissioner Patterson who stated:

> I am convinced that any regulations, whether with respect to qualifications or maximum hours of labor, which this Commission can or may prescribe for mechanics and loaders will not improve highway safety. I doubt that any such regulations will be prescribed. Assertion by us of jurisdiction over these employees will, however, have the unfortunate result of depriving them of the benefits of section 7 of the Fair Labor Standards Act. (28 M. C. C. at 141.)

In its conclusion to the March 1941 report finding that the duties of mechanics, loaders, and drivers' helpers affect safety of operation, the Commission stated that a further hearing would be held to determine what regulations, if any, should be prescribed for the employees, other than drivers, found subject to its jurisdiction. (28 M. C. C. at 139.) Such a hearing was held May 19–27, 1941 (I. C. C. Docket BMC, Ex Parte 2, vols. 15–16), but to date no report has been written or regulations prescribed. This failure to fix hours of service of these employees, eleven years after the passage of the Motor Carrier Act, not only bears out Commissioner Patterson's prediction but casts further doubt on the appropriateness of such regulation for the accomplishment of the Commission's function of promoting safety on the highways.

II

AN EMPLOYEE WHO SPENDS THE GREATER PORTION OF HIS TIME IN ACTIVITIES WHICH DO NOT AFFECT SAFETY OF OPERATION OF MOTOR VEHICLES IN INTERSTATE TRANSPORTATION IS NOT EXEMPT FROM THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT UNDER SECTION 13 (b) (1)

Even if it be assumed that loading activities affect safety of operation within the Commission's regulatory power and therefore are within the 13 (b) (1) exemption, there is the further question whether the exemption applies to employees who perform both "exempt" and "non-exempt" work in the same workweek. The answer to this question cannot be ascertained by considering only the terms of Section 204 of the Motor Carrier Act or the Commission's rulings interpreting that section. It depends also upon consideration of the terms and purposes of the Fair Labor Standards Act.[5] The brief of the Solicitor General (No. 22, p. 5) states that the application of the exemption to an employee who is

[5] It may be noted that, notwithstanding the statement in the Commission's brief in No. 22 (pp. 33–34) that "the question of exemption from the Labor Act [must] be determined solely by whether the employee is subject to the Commission's said authority under the Motor Carrier Act," the Commission itself, in ruling on the scope of its jurisdiction under Section 204 of the Motor Carrier Act, has consistently declined to express its opinion as to the application of the 13 (b) (1) exemption. See *Ex Parte MC–2*, 28 M. C. C. 125 at p. 126; *Ex Parte MC–3*, 23 M. C. C. 1 at p. 39.

primarily engaged in activities not affecting safety of operation would lead to absurd results and would be inconsistent with the legislative policy of both the Motor Carrier Act and the Fair Labor Standards Act. It is our view that for this reason alone the exemption should be denied to such an employee. We are also of the view, however, contrary to the suggestion in the Solicitor General's brief, that the exemption should be denied by application of the ordinary rules of statutory interpretation.

The position of the Administrator is as follows: (1) The Interstate Commerce Commission's power under Section 204 is limited to activities which affect safety of operation in interstate transportation and does not extend to other work. Therefore, the Commission does not have power with respect to an employee when he is not engaged in safety activities and the language of Section 13 (b) (1) does not require that the exemption apply when he is not so engaged. (2) In any event, it would lead to absurd results and run counter to the legislative policy of both the Motor Carrier Act and the Fair Labor Standards Act to hold the exemption applicable where the employee spends the major part of his time in work which does not affect safety of operation. (3) The interpretation most consistent with the legislative policy of both statutes and with the purpose of the exemption is the Administrator's

position that the exemption is inapplicable to employees in workweeks in which they spend the major part of their time performing work which does not affect safety of operation.

1. It is well settled that the Commission's regulatory power under Section 204 of the Motor Carrier Act is limited to activities affecting the safety of operation of motor vehicles engaged in interstate transportation. *United States* v. *American Trucking Assns.*, 310 U. S. 534; *Ex Parte No. MC–2*, 13 M. C. C. 481, 488. Among other things, the Commission may prescribe the conditions under which persons may engage in such activities, including their "maximum hours of service" (Section 204). The Motor Carrier Act, however, does not confer upon the Commission power to regulate any other kind of work. With respect to the hours spent in other work, the Commission can only provide that a person cannot engage in interstate driving or activities related to the safety thereof if his hours of any kind of work exceed a prescribed number. But this is not equivalent to "power to establish * * * maximum hours" for such other work within Section 13 (b) (1) of the Fair Labor Standards Act. Consequently, the exemption does not by its terms apply when an employee is engaging in non-safety work.

The non-existence of Commission power over activities which do not affect safety may be illustrated by example. Thus, an employee may en-

gage in interstate driving or the loading of interstate trucks for 40 hours during the first four days of a workweek and, so far as the Commission's interest or power is concerned, may engage in other work 24 hours a day for the remaining three days, making a workweek of 112 hours. While the Commission can prohibit an employee from engaging in such interstate driving or loading once he has worked 60 hours within any 168-hour period,[6] it can place no limit on the weekly maximum hours spent in other kinds of work.[7] When the employee is engaged in such other kinds of work he is not an employee over whose hours the Commission has regulatory power except insofar as the Commission may be said to have power over everyone's hours because it may prohibit him from engaging in interstate driving or loading if he has done 60 hours work of any kind within a 168-hour period. A more accurate analysis of the Commission's powers under the Motor Carrier Act indicates that the time spent in

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[6] Rule 1 (e), Part 5, Motor Carrier Safety Regulations, revised 1941. This "sliding week" of 168 hours has no relation to the workweek (consisting of an *established* period of seven consecutive days) which serves as the standard for application of the overtime provisions of the Fair Labor Standards Act. See Interpretative Bulletin No. 4, par. 3, Wage and Hour Division, United States Department of Labor, originally issued October 21, 1938, revised November 1940, 1942 Wage Hour Man. 104.

[7] Interstate Commerce Commission, Bureau of Motor Carriers, Ruling No. 79, May 16, 1939.

activities not affecting safety of operation is not subject to the Commission's regulatory power, but is only considered by the Commission as a guide in prescribing the qualifications for engaging in interstate transportation. This distinction is a basic one. Concededly "overfatigue from excessive hours may result, not only from that part of an employee's work affecting safety of operation, but also from that part not affecting such safety" (see Commission's br., p. 36), and therefore the Commission must consider the hours spent in other work in prescribing qualifications for work affecting safety of operation. But it does not follow and the Commission does not assert that it has power to prescribe maximum hours for such other work.

Since the Commission cannot limit the hours spent in non-safety work and can only consider such hours in determining whether the employee may engage in activities affecting safety of operation, it cannot be said that non-safety activities are subject to regulation by the Commission. Such a view of "regulation" would even embrace employees who perform no "safety" work whatever. For example, an employee who works as a warehouseman or a clerk for a total of 60 hours during the first six days of a workweek might conceivably be used to make interstate trips during the seventh day but is prohibited from making them by the Commission's regulations. Thus, the employee does not engage in any "safety"

activities at all in that workweek or perhaps even in the following week; yet, his other work has the effect of preventing him from engaging in interstate transportation under the Commission's regulations. To contend that, because of its use as a guide, such a workweek devoted exclusively to work unrelated to safety of operation in interstate transportation is subject to the Commission's regulatory power, would be patently absurd. The Commission, of course, has made no such suggestion. On such a theory the "power" of the Commission would extend to a lawyer in his office, a sales clerk in a store, or indeed any person working anywhere, because conceivably he might at some time want to help load a truck for an interstate trip, in which case, the Commission would look back to the work he performed within the preceding 168 hours. Every such employee could be considered subject to the Commission's regulatory power simply because of the possibility that he might engage in interstate motor carrier transportation. This is clearly contrary to the Commission's own views which were upheld in *United States* v. *American Trucking Assns.*, *supra*.

Thus, the employees in the instant cases would be subject to the jurisdiction of the Interstate Commerce Commission only during those hours in which they performed work affecting the safety of interstate transportation. During those hours they would concededly be "employee[s] with re-

spect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935" within Section 13 (b) (1). It is equally clear, however, that they are not such employees when engaged in the other activities which occupied most of their working time. Neither the literal language of Section 13 (b) (1),* nor of any other provision of the Fair Labor Standards Act or the Motor Carrier Act, nor any considerations of policy require that an employee be deprived of the overtime benefits of the Fair Labor Standards Act in such a situation. On the contrary, such an interpretation of exemptive provisions would unduly restrict the application of the Fair Labor Standards Act. As we shall show, the courts, by denying their application where employees have engaged in both exempt and non-exempt work, have recognized that to apply exemptions merely because some exempt work was performed would defeat the statutory purpose and would indeed lead to absurd results.

2. As the Solicitor General's brief points out (p. 4), to allow an exemption from the Fair Labor

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*The Commission's brief seems to suggest (p. 33, et seq.) that, under the literal language of Section 13 (b) (1), the fact that an employee is subject to the Commission's power at *any time* is sufficient for the exemption to apply. The difficulty with this argument is that it proves too much. If the exemption were read in that manner, an employee might be exempt for a year or, indeed, an indefinite period of time simply because at one time the Commission had power over him.

Standards Act where employees spend only a small proporiton of their time performing work in which the Commission has any interest would open an easy avenue for evasion of the Act. An employer need only assign employees engaged in clerical work or other non-safety activities to loading, repair work, or "helping" for a few hours each week, and thus subject them to the "power" of the Commission in order to avoid any regulation of hours whatsoever.[9] Even if the literal statutory language required such a construction, the result, as the Solicitor General's brief states (p. 5), is "absurd enough to warrant resort to the doctrine of *Holy Trinity Church* v. *United States*, 143 U. S. 457."

Consequently, the courts have consistently refused to apply the exemption provided by Section 13 (b) (1) merely because some exempt work was performed. *Walling* v. *Comet Carriers*, 151

[9] Thus, under the theory advanced by the Illinois Appellate Court, and urged in the Commission's brief, an employee who spent 55 hours during the first 5½ days of the workweek in clerical or other non-safety work, so that he would have been entitled to additional compensation under Section 7 for 15 overtime hours, could be divested of this overtime compensation by the assignment of any amount of safety work during the last afternoon of the week. In fact, under the Commission's sliding workweek rule (note 6, *supra*), the performance of safety work even early in the subsequent week could also deprive an employee of this overtime compensation. The hours worked in the prior week would have to be used to determine whether more than 60 hours were worked in any 168-hour period and, therefore, under the Commission's theory, would be subject to its jurisdiction.

F. 2d 107 (C. C. A. 2); *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C. C. A. 6); *Walling* v. *West Ky. Coal Co.*, 153 F. 2d 582 (C. C. A. 6); *Walling* v. *Griffin Cartage Co.*, 153 F. 2d 587 (C. C. A. 6); *Walling* v. *Morris*, 155 F. 2d 832 (C. C. A. 6); *Musteen* v. *Johnson*, 133 F. 2d 106 (C. C. A. 8); *Hutchinson* v. *Barry*, 50 F. Supp. 292 (D. Mass.); *Keegan* v. *Ruppert*, 6 Wage Hour Rept. 676 (S. D. N. Y.); *Crean* v. *Moran Transp. Lines*, 57 F. Supp. 212 (W. D. N. Y.); *Walling* v. *Palmer*, 6 Wage Hour Cases 297 (M. D. Pa.); *Walling* v. *Gordons Transports*, 8 Wage Hour Rept. 838 (W. D. Tenn.); *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617 (W. D. Ky.); *Anuchick* v. *Transamerican Freight Lines, Inc.*, 46 F. Supp. 861 (E. D. Mich.); *Davis* v. *Southern Calif. Freight Lines*, 8 Wage Hour Rept. 1151 (S. D. Calif., 1945); *McKeown* v. *Southern Calif. Freight Forwarders*, 49 F. Supp. 543 (S. D. Calif.); *Potashnick Local Truck System* v. *Archer*, 179 S. W. 2d 696 (S. Ct. Ark.); *Colbeck* v. *Dairyland Creamery Co*, 17 N. W. 2d 262 (S. Ct. S. D., 1945). Similarly, other exemptions have been denied where employees performed both exempt and non-exempt work during the same workweek. Thus, the exemption for "any employee employed as a seaman" (Section 13 (a) (3)) has been held inapplicable to an employee engaged in employment of a "mixed kind" where the "dominant employment" was not maritime in nature (*Walling* v. *Haden*, 153 F. 2d 196, at 199 (C. C. A. 5);

Anderson v. *Manhattan Lighterage Corp.*, 148 F. 2d 971 (C. C. A. 2), certiorari denied, 326 U. S. 722). The exemption provided for "any switchboard operator employed in a public telephone exchange which has less than 500 stations" has been held inapplicable to an employee who was a switchboard operator at such a telephone exchange, but who was also a toll collector and ticket seller for a toll road, on the ground that an employee so engaged both "in exempt activity and in non-exempt activity * * * obviously [is] not within the Act's exemption." *North Shore Corp.* v. *Barnett*, 143 F. 2d 172, at 175 (C. C. A. 5). For similar rulings with respect to other exemptions, see *Shain* v. *Armour & Co.*, 50 F. *Supp.* 907 (W. D. Ky.); *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938, at 943 (D. Minn.); *Fleming* v. *Swift & Co.*, 41 F. Supp. 825 (N. D. Ill.); *Walling* v. *Bridgeman-Russell Co.*, 6 Wage Hour Rept. 132 (D. Minn., 1942) (employees engaged in "first processing" operations within the exemption provided by Section 7 (c) and also engaged in non-exempt activities); *Walling* v. *Peacock Corp.*, 58 F. Supp. 880, 883 (E. D. Wis.) (employee engaged part of the time in handling, packing, and drying agricultural commodities within the exemption provided by Section 13 (a) (10) and part of the time in non-exempt activities).

Furthermore, this Court in an analogous situation presented in *Phillips* v. *Walling*, 324 U. S. 490, indicated that performing a combination of exempt and non-exempt functions may result in denial of an exemption. That case involved the application to a chain store organization of the exemption provided by Section 13 (a) (2) for "any employee engaged in any retail or service establishment." In rejecting the contention that the employees in the chain store warehouses were part of a retail establishment, this Court said that "Even if, as petitioner urges, the word 'establishment' referred to an entire business or enterprise, the *combined* retail-wholesale nature of petitioner's interstate business would prevent it from properly being classified as a local 'retail establishment.'" (P. 496.) (Emphasis supplied.) Applying the same principle, the lower Federal courts have consistently either denied exemptions entirely to businesses which contained both exempt and non-exempt characteristics (*Collins* v. *Kidd Dairy & Ice Co.*, 132 F. 2d 79, 80 (C. C. A. 5); *Guess* v. *Montague*, 140 F. 2d 500, 503 (C. C. A. 4); *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C. C. A. 6); *Wood* v. *Central Sand & Gravel Co.* 33 F. Supp. 40, 47 (W. D. Tenn.)), or denied their application to employees engaged in an aspect of the business outside the purpose of the exemption although within its literal terms. *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4);

Walling v. *Connecticut Co.*, 154 F. 2d 552 (C. C. A. 2). In the latter case the court of appeals viewed as "literally * * * correct" the employer's claim that the exemption provided by Section 13 (a) (9) for employees of local trolley or motor bus carriers extended to its power plant as well as its trolley and bus employees. It held, however, that "the policy of the Act, disclosed in its history, precludes the acceptance of such a literal construction" (p. 553).

Thus, the courts have recognized that if more than lip-service is to be paid to the principle that "any exemption from [this] humanitarian and remedial legislation must * * * be narrowly construed" and not extended "to other than those plainly within its terms and spirit," (*Phillips* v. *Walling*, 324 U. S. 490, 493), exemptions cannot be held applicable to an employee or an employer simply because he engages in some exempt work if he also engages in other work which Congress clearly intended to subject to the statutory standards. Any other interpretation would open the door wide to evasion of the purposes of the Act to eliminate substandard labor conditions. It would result in cutting across and absorbing into the exemptions parts of industries and activities plainly covered by the Act, simply because the same employees or employers happened to engage in several kinds of activities.

It would indeed be an absurd result in cases involving the 13 (b) (1) exemption if an employer of employees engaged in work outside the Commission's regulatory power could avoid all regulation of those hours of work by assigning them to safety of operation tasks for a short period each week.[10]

3. As this Court stated in *Southland Co.* v. *Bayley*, 319 U. S. 44, 47, the 13 (b) (1) exemption

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[10] In view of the Commission's position that the performance of any amount of safety of operation work invokes the exemption, it may be pertinent to direct attention to decisions under a statute administered by the Commission which refuse to apply statutory provisions limiting hours of work to employees who performed some work within the statutory language but whose primary duties were of a different nature. Thus, provisions of the Hours of Service Act (45 U. S. C. 61), limiting the hours of "an operator, train dispatcher, or other employee, who, by the use of the telegraph or telephone, dispatches trains" (see *Ex Parte No. MC-2*, 28 M. C. C. 125, 130), were held inapplicable to a conductor of an interstate train, who was required or permitted during his run to stop at stations to report, transmit, receive, or deliver orders pertaining to or affecting his train. *United States* v. *Florida East Coast Ry. Co.*, 222 Fed. 33 (C. C. A. 5). The court reasoned that the conductor's "*primary and chief duty* requires him to look after his train, and stopping at a station to transmit or receive an order, affecting his immediate train, is a mere incidental service, which cannot operate to classify him as a telegraph or telephone operator or train dispatcher" (222 Fed. at 36) (italics supplied). See also *Missouri Pac. Ry. Co.* v. *United States*, 211 Fed. 893 (C. C. A. 8). The principle which militates against applying a maximum hours statute to employees whose primary function is not the one which the Act is designed to regulate has greater force in this case which involves an exemption from a remedial statute.

should not be construed "simply by a literal reading of the exemption section of the Fair Labor Standards Act and the delegation of power section of the Motor Carrier Act. Both sections are parts of important general statutes and their particular language should be construed in the light of the purposes which led to the enactment of the entire legislation." We submit that the construction advanced by the Administrator, which limits the exemption to employees who spend the greater part of the workweek in safety work, is a sensible interpretation which accomplishes the purpose of the exemption and is most consistent with the basic legislative policy of both statutes.

In the *Southland* case, this Court recognized that a primary purpose of the Fair Labor Standards Act is to prohibit the employment of persons in interstate commerce under substandard labor conditions, and pointed out that "by exempting the drivers of motors from maximum hour limitations of the Fair Labor Standards Act, Congress evidently relied upon the Motor Carrier provisions to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime" (*id.* at 48). If this is what Congress had in mind, it seems clear that the exemption was not intended to extend to employees who devote but a few hours in a workweek to work subjecting them to regulation by the Com-

mission. Clearly, Congress had in mind employees over whom the Commission could exercise regulatory power for a sufficient portion of their worktime so that such regulation would actually be effective to limit hours of work. In other words, the exemption was intended to apply only to employees regularly employed in the kind of work subject to effective hours regulation under the Motor Carrier Act, and was not intended to apply to employees employed primarily in work with which the Motor Carrier Act has no concern. In the latter situation, the Motor Carrier provisions cannot, as a practical matter, "work out satisfactory adjustments" to secure effective limitation of hours of work.

Formerly, the Administrator interpreted this exemption to be inapplicable to an employee who spent a substantial amount of his time in nonexempt work.[9] However, in order to insure against any likelihood that an employee might be subject to simultaneous maximum weekly hours regulation under two statutes and to bring his interpretation more clearly in line with what he conceived to be the Congressional intent, the Administrator revised his interpretation so as to

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[9] "Substantial" was later explained to mean more than 20 percent of the employee's time. Interpretative Bulletin No. 9, U. S. Department of Labor, Fourth Revision, March 1942, Par. 5 (c), Wage and Hour Manual, 1943 Edition, p. 186. See also April 1941 Revision of this Bulletin, Wage and Hour Manual, p. 377.

construe the exemption as inapplicable to an employee "who spends the greater part of his time during any workweek on non-exempt activities (such as producing, processing or manufacturing goods, warehouse or clerical work, or other type of work which does not affect safety of operations)."[12] Interpretative Bulletin No. 9 (revision October 1943, par. 4 B).[13] The Administrator's interpretation draws a line sufficiently broad to assure exemption of all workers whose hours are actually subject to the Interstate Commerce Commission's control and to avoid jurisdictional conflicts. Cf. *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971, at 973 (C. C. A. 2), certiorari denied, 326 U. S. 722. It has the practical advantage of enabling the determination whether an employee performing duties of a mixed character is within the purview of the exemption to be made logically and with a relative degree of certainty.

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[12] The Administrator's 50 percent interpretation was adopted following the opinion of the court in *Hutchinson* v. *Batey*, 50 F. Supp. 292 (D. Mass.). See *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C. C. A. 6). In the *Hutchinson* case, where the plaintiff spent two-thirds of his time washing trucks and one-third loading and driving trucks, the court awarded plaintiff judgment for overtime, stating (p. 296): "* * * I may add that in any event I should not construe the section 13 (b) exemption as applicable to any week where the plaintiff spent more than fifty per cent of his time washing cars."

[13] A copy of the latest Revision of Interpretative Bulletin No. 9 is printed in the Appendix.

The construction advanced by the Administrator offers a reasonable and satisfactory adjustment of the problem that not only results in no conflict with the Commission's jurisdiction,[14] but as a practical matter avoids any dual regulation of the maximum weekly hours, since, as we have shown, even should the Commission eventually prescribe maximum hours for loaders, such regulations could not limit effectively the hours of employees engaged primarily in work unrelated to safety of operation. We submit that it is a reasonable construction for accomplishing the purpose of the exemption and at the same time preserving the basic "purposes which led to the enactment of the entire legislation." See *Southland* case, *supra*, at 47.

CONCLUSION

For the foregoing reasons, it is respectfully submitted (1) that there is considerable doubt whether the Commission's power extends to the regulation of loaders, (2) that, although denial of the exemption where the employees spend a substantial amount of time in non-safety work would accord with the generally accepted

[14] Actually, no employee engaged in any safety of operation activities is withdrawn from the jurisdiction of the Commission inasmuch as the payment of overtime for hours in excess of 40 per week is in no way incompatible with compliance with any maximum hours the Commission may prescribe. Cf. *Ex Parte No. MC–2*, 6 M. C. C. 557, 560–561.

interpretaiton of exemptions under the Act, its application on the ground that a substantial amount of exempt work was performed would be inconsistent with the ordinary rules of statutory interpretation and would achieve absurd results, and (3) the Administrator's interpretation accomplishes the purpose of the exemption and does not conflict with the Commission's jurisdiction.

Respectfully submitted.

WILLIAM S. TYSON,
Solicitor,

JETER S. RAY,
Associate Solicitor,
United States Department of Labor.

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APPENDIX

Interpretative Bulletin No. 9

Exemption From Maximum Hour Provisions for Certain Employees of Motor Carriers

THE SCOPE AND APPLICABILITY OF THE EXEMPTION PROVIDED BY SECTION 13 (B) (1) OF THE FAIR LABOR STANDARDS ACT OF 1938

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United States Department of Labor,
Wage and Hour Division,
Office of the Administrator

THE SCOPE AND APPLICABILITY OF THE EXEMPTION PROVIDED BY SECTION 13 (B) (1) OF THE FAIR LABOR STANDARDS ACT OF 1938

1. Section 13 (b) (1) of the Act exempts from the maximum hour provisions of section 7—

> (1) Any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *

This section, it will be noted, does not exempt any such employee from the minimum wage provisions of section 6.

2. The scope of the exemption provided in section 13 (b) (1) involves the interpretation not only of the Fair Labor Standards Act but also of section 204 of the Motor Carrier Act, 1935. The Act confers no authority upon the Administrator to extend or restrict the scope of the exemption provided in section 13 (b) (1) or even to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the course which the Administrator will follow in the performance of his administrative duties until otherwise required by the authoritative rulings of the courts. It is nevertheless to be noted that the Supreme Court has held that the interpretations expressed in bulletins of this Division are entitled to great weight.[1]

3. *Drivers of Common, Contract and Private Motor Carriers.* Drivers of common, contract and private carriers engaged in transportation in interstate and foreign commerce within the meaning of the Motor Carrier Act, 1935, will be considered exempt from the maximum hour provisions of the Fair Labor Standards Act by virtue of section 13 (b) (1).

Section 204 (a) (1) and (2) of the Motor Carrier Act, 1935, place upon the Interstate Commerce Commission the duty to regulate common and contract carriers by motor vehicles and to that end authorize the Commission to "establish reasonable requirements with respect

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[1] *United States* v. *American Trucking Association, Inc.*, 310 U. S. 554. See also *United States* v. *F. W. Darby Lumber Co.*, 61 Sup. Ct. 451, 459; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572.

to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment." In a proceeding entitled "Ex Parte No. MC–2" the Commission, as the Supreme Court noted in its decision in the *American Trucking Associations* case, has established maximum hours of service for drivers of motor vehicles operated by common and contract carriers in interstate and foreign commerce.[2] See 3 M. C. C. 665; 6 M. C. C. 557.

Section 204 (a) (3) of the Motor Carrier Act, 1935, places upon the Commission the duty "to establish for private carriers of property by motor vehicle, *if need therefor is found,* reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment." On May 1, 1940, it was held by

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[2] The Commission has held that transportation confined to points in a single State over highways located entirely within that State performed by a motor carrier on shipments destined to Puerto Rico or Hawaii is not in interstate or foreign commerce within the meaning of Part II of the Interstate Commerce Act, since Hawaii and Puerto Rico are neither "States" nor "foreign countries" within the meaning of sections 203 (a) (8), (10) and (11) of the Act, 27 M. C. C. 463; 33 M. C. C. 660: The Fair Labor Standards Act is broader in its definition of interstate commerce in that section 3 (c) defines "State" to mean "any State of the United States or the District of Columbia or any territory or possession of the United States." Employees engaged in connection with transportation of the type described above are engaged in Interstate Commerce within the meaning of the Fair Labor Standards Act and not being subject to the Motor Carrier Act, 1935, because not engaged in interstate or foreign commerce within the meaning of that Act, are not within the exemption provided by section 13 (b) (1).

Division No. 5 of the Commission in a proceeding entitled "Ex Parte No. MC–3" that a need exists for the regulation by the Commission of private motor carriers engaged in interstate or foreign commerce. Accordingly, the maximum hour regulations already prescribed by the Commission for drivers of common and contract motor carriers were prescribed for drivers employed by private carriers. See 23 M. C. C. 1.

4. *Other Employees of Common, Contract and Private Motor Carriers.* (a) It has been held by the Supreme Court of the United States that the power of the Interstate Commerce Commission to prescribe qualifications and maximum hours of service for employees of common, contract and private motor carriers under sections 204 (a) (1), (2) and (3) of the Motor Carrier Act is limited to prescribing qualifications and maximum hours of service for those employees whose activities affect the safety of operation of motor vehicles[3] and are engaged in transportation in interstate commerce.

In Ex Parte No. MC–28, the Commission recognized that there may be some employees of common, contract and private carriers other than drivers whose activities affect safety of operation of motor vehicles and it made provision for determining, upon petition of interested parties, whether any class of employees other than drivers affect safety of operation. Shortly after the decision of the United States Supreme Court in the case of *United States* v. *American Trucking Asso-*

[3] *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534.

ciations, Inc., above, the American Trucking Association, Inc., filed a petition asking the Commission to determine which employees, if any, other than drivers affect the safety of operation of motor vehicles. On March 4, 1941, the Interstate Commerce Commission published a report in Ex Parte No. MC–2 and Ex Parte No. MC–3 to the effect that mechanics, loaders and drivers' helpers (including conductorettes on buses and armed guards in armored trucks) affect the safety of operation of motor vehicles and are, therefore, subject to the Commission's authority to prescribe qualifications and maximum hours of service pursuant to section 204 (a) of the Motor Carrier Act.[4] As is apparent from the Commission's opinion, loaders do not include employees engaged solely in unloading motor vehicles or red caps of bus companies engaged in loading baggage on buses. Similarly, mechanics do not include garage employees who merely oil, gas, grease, or wash motor vehicles, or painters, carpenters, or tarpaulin menders.[5]

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[4] In this connection it is to be noted that at least three courts have held that in suits under section 16 (b), the courts may determine what employees lie within the Commission's power to prescribe hours of service and may reach decisions different from those reached by the Commission. *Missel* v. *Overnight Motor Transp. Co.*, 36 F. Supp. 980, reversed on other grounds, 126 F. (2d) 98; *West* v. *Smoky Mountains Stages*, 40 F. Supp. 296, and *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742.

[5] *Anuchick* v. *Transamerican Freight Lines*, 46 F. Supp. 861 (E. D. Mich. 1942) 3 Federal Carrier Cases, par. 80,058 (mechanics engaged in building new truck bodies or repairing bodies of used or damaged trucks and mechanics who engage in manufacturing of trucks, rather than repair or

The Commission has not yet issued any regulations concerning maximum hours of service for mechanics, loaders and drivers' helpers, although it has held hearings preparatory to such regulations. However, the Supreme Court in its decision in the *Southland Gasoline Co.* v. *Bayley and Richardson* v. *Gibbons Co.* cases (63 Sup. Ct. 917) held that the "power" to fix the maximum hours for drivers of private carriers existed in the Commission since the enactment of the Motor Carrier Act in 1935 and that the section 13 (b) (1) exemption applied to such employees from the enactment of the Fair Labor Standards Act in 1938. The fact that the Commission did not exercise that power until 1940 [Ex Parte MC–3, 23 M. C. C. 1] was held not to affect the existence of the power. Likewise we believe these Supreme Court decisions establish that the power exists in the Commission to fix the maximum hours of work of drivers' helpers, mechanics and loaders of common, contract and private carriers under the provisions of section 204 of the Motor Carrier Act, 1935, and that such employees are presently exempt under section 13 (b) (1), regardless of the fact that the Commission has not yet exercised this power. All other classes of employees of common, contract and private motor carriers are clearly not within the exemption contained in section 13 (b) (1).

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maintenance held not to be within Commission's jurisdiction); *McKeown* v. *Southern California Freight Forwarders et al.*, 49 F. Supp. 543, (S. D. Cal.) 3 Federal Carrier Cases, par. 80,086 (employee engaged in checking goods unloaded from trucks and occasionally assisting in loading held not within section 13 (b) (1) exemption).

(b) It should be noted that any truck driver, drivers' helper, mechanic or loader employed by a common, contract or private carrier, who spends the greater part of his time during any workweek on nonexempt activities (such as producing, processing or manufacturing goods, warehouse or clerical work, or other type of work which does not affect safety of operations) is not within the scope of the exemption contained in section 13 (b) (1). It is the opinion of the Division that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time in work other than that which forms the basis of the exemption.[6]

5. *Employees Engaged in the Production of Goods for Interstate Commerce.* The wage and hour provisions of the Fair Labor Standards Act apply to employees engaged in interstate commerce or in the production of goods for interstate commerce. See Interpretative Bulletins Nos. 1 and 5. The Act, by including production for interstate commerce, is therefore broader in its coverage than the Motor Carrier Act, 1935. Thus, the Fair Labor Standards Act applies to employees engaged in the transportation of persons or property by motor vehicle between places within a State where the transportation constitutes the production of goods for commerce, as

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[6] See *Anuchick et al.* v. *Transamerican Freight Lines*, *supra*; *Hutchinson* v. *Barry* (U. S. D. C., Mass.) 3 Federal Carrier Cases, par. 80,095 (6 Wage Hour Rept. 616); cf. *Knight, Inc.* v. *Mantel*, 6 Wage Hour Rept. 466.

[7] This paragraph applies to common, contract and private carriers.

the term "produced" is defined in section 3 (j) of the Act, even though the goods have not yet entered into interstate commerce so as to subject the employees engaged in connection with their transportation to the jurisdiction of the Interstate Commerce Commission. Examples are: (a) drivers transporting goods in and about a plant producing goods for commerce; (b) chauffeurs or drivers of company cars or buses transporting officers or employees from place to place in the course of their employment in an establishment which produces goods for commerce; (c) drivers who transport goods from a producer's plant to the plant of a processor, who, in turn, sells goods in interstate commerce, the first producer's goods being a part or ingredient of the second producer's goods; (d) drivers who transport goods from a factory to the plant of an independent contractor who performs operations on the goods and returns same by truck to the factory which further processes such goods for commerce. These and other employees engaged in connection with the transportation of persons or property by motor vehicle who are subject to the Fair Labor Standards Act because engaged in the production of goods for interstate commerce and who are not subject to the Motor Carrier Act, 1935, because not engaged in interstate or foreign commerce within the meaning of that act, are not within the exemption provided by section 13 (b) (1).*

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* *Hamlet Ice Co.* v. *Fleming*, 127 F. (2d) 165, 5 Wage Hour Rept. 295; *Atlantic Co.* v. *Walling*, 131 F. (2d) 514, 5 Wage Hour Rept. 916; *Dallum* v. *Farmers Cooperative Trucking Assn.*, 5 Wage Hour Rept. 953; *Walling* v. *Villaume Box*

6. *Employees Employed in Wholesale Distribution Within a State of Goods Received from Outside the State.* (a) It is the opinion of the Wage and Hour Division that many employees of wholesale establishments engaged in the distribution within a State of goods which have been received from other States are engaged in interstate commerce within the meaning of the Fair Labor Standards Act.[9] The Interstate Commerce Commission has jurisdiction under section 204 of the Motor Carrier Act, 1935, over employees of carriers engaged in transportation in interstate or foreign commerce whose duties affect the safety of operation of motor vehicles. The Division deems it necessary for enforcement purposes to consider any employees of wholesale establishments who engage in interstate commerce under the Fair Labor Standards Act and whose duties affect the safety of operation of motor vehicles as exempt from the overtime provisions of the Act under section 13 (b) (1).[10] While the question may not be free from doubt since earlier decisions of the Interstate Commerce Commission seemingly have limited the scope of the Motor Carrier Act more narrowly than the courts have construed the Fair Labor Standards Act, nevertheless if such employees are engaged in interstate com-

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and Lumber Co., 6 Wage Hour Rept. 544 (D. Minn. 1943); *Walling* v. *Desoto Creamery Co.*, 6 Wage Hour Rept. 643 (D. Minn. 1943); cf. *Chapman et al.* v. *Home Ice Co.*, 6 Wage Hour Rept. 570 (C. C. A. 6, 1943).

[9] *Walling* v. *Jacksonville Paper Co.*, 63 Sup. Ct. 332; *Walling* v. *American Stores Company*, 133 F. (2d) 840.

[10] The 50 percent test set forth in paragraph 4 (b) herein is, of course, applicable.

merce within the meaning of the Fair Labor Standards Act, it is the policy of the Division to regard them as likewise engaged in interstate commerce within the meaning of the Interstate Commerce Act. This position is, of course, taken without prejudice to the rights of the employees under section 16 (b) of the Act.

(b) The Interstate Commerce Commission has consistently maintained that transportation of consumable goods (such as food, coal and ice) to railroads, docks, etc., for use on trains and steamships is not such transportation as is subject to its jurisdiction.[11] In the view of the Division, employees of such companies are engaged in (interstate) commerce[12] as that term is used in the Fair Labor Standards Act. Since the Interstate Commerce Commission has disclaimed jurisdiction over this type of operation, it is the Division's opinion that drivers, drivers' helpers, mechanics and loaders employed by companies engaged in such activities are covered by the Fair Labor Standards Act, and are not within the exemption contained in section 13 (b) (1).

7. *Special Classes of Carriers.*

(a) Prior to the amendment of May 16, 1942, to section 202 (c) (2) of the Motor Carrier Act

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[11] *New Pittsburgh Coal Co.* v. *Hocking Valley Railway Co.*, 24 I. C. C. 244; *Corona Coal Co.* v. *Secretary of War*, 69 I. C. C. 389; *Bunker Coal from Alabama to Gulf Ports*, 227 I. C. C. 483.

[12] These employees may also be engaged in a "process or occupation necessary to the production" of goods for commerce within the meaning of section 3 (j) of the Fair Labor Standards Act. *Atlantic Co.* v. *Walling*, *supra*; *Hamlet Ice Co.* v. *Fleming*, *supra*.

(Part II of the Interstate Commerce Act), the Division's position was that the exemption provided for in section 13 (b) (1) of the Fair Labor Standards Act was *not applicable* to any employees of a motor carrier performing pick-up and delivery service under contract with a railroad or water carrier. This view was based upon the decision of the Interstate Commerce Commission that such employees are not within its regulatory power under Section 204 of the Motor Carrier Act.[13] On the other hand, prior to the above date, the Division's position that the 13 (b) (1) exemption was *applicable* to drivers, mechanics, loaders, and drivers' helpers employed in pick-up and delivery service to line haul motor carrier depots or under contract with forwarding companies, depended upon the Interstate Commerce Commission's determination that its regulatory power under section 204 of the Motor Carrier Act extended to such employees.

However, the amendment of May 16, 1942, operated to remove the distinctions between the categories referred to above in that it made the exemption applicable in each instance.

Section 202 (c) (2) of the Motor Carrier Act, as amended, makes section 204 of that Act "relative to qualifications and maximum hours of service of employees and safety of operations and equipment," applicable "to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a * * * railroad * * * express company * * * motor carrier * * * water carrier * * *

[13] See *Scott Brothers, Inc.*, 4 M. C. C. 55.

or a freight forwarder * * * in the performance within terminal areas of transfer, collection or delivery service." Thus, by reason of the amendment, drivers, mechanics, loaders and drivers' helpers of a motor carrier performing pick-up and delivery service for a railroad, express company, or water carrier are to be regarded as within the 13 (b) (1) exemption since May 16, 1942.[14]

The same result is to be reached for drivers, mechanics, loaders and drivers' helpers employed *directly* by a railroad, a water carrier or a freight forwarder in pick-up and delivery service. Section 202 (c) (1) of the Motor Carrier Act, as amended on May 16, 1942, includes employees employed by railroads, water carriers, and freight forwarders, in transfer, collection and delivery service in terminal areas by motor vehicles within the Interstate Commerce Commission's regulatory power under section 204 of the same act.[15]

(b) The Interstate Commerce Commission has disclaimed jurisdiction under the Motor Carrier Act of employees engaged in the transportation of mail under contract with the Post Office De-

[14] In the case of drivers, mechanics, loaders and drivers' helpers of an employer performing pick-up and delivery service to a motor carrier depot or under contract with a freight forwarder, the exemption is, of course, to be applied prior to May 16, 1942, as well as since that date.

[15] Note, however, that such employees of a carrier subject to Part I of the Interstate Commerce Act are exempt under Section 13 (b) (2). Thus, only employees of a railroad, water carrier, or freight forwarder outside of the scope of Part I of the Interstate Commerce Act and of the 13 (b) (2) exemption are affected by the above on and after the date of the amendment.

partment in vehicles used exclusively for that purpose. See 3 M. C. C. 694, 697. It would thus appear that such employees of mail contractors are not within the exemption provided by section 13 (b) (1) of the Fair Labor Standards Act. Employees of mail contractors are not employees of the United States within the meaning of section 3 (d) of the Fair Labor Standards Act.[16] Since it would also appear that they are engaged in interstate commerce it is the position of the Division that they are entitled to overtime compensation under section 7 of the Fair Labor Standards Act.[17]

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[16] *Fleming* v. *Gregory*, 36 F. Supp. 776; *Thompson* v. *Daugherty*, 40 F. Supp. 279; and *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742.

[17] *Thomason* v. *Daugherty*, *supra*, but see *Magann* v. *Long's Baggage Transfer Co.*, *supra*, *contra*.

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Q. 7-25

SUPREME COURT OF THE UNITED STATES

No. 22.—October Term, 1946.

Max Levinson, Petitioner, v. Spector Motor Service, a Corporation. } On Writ of Certiorari to the Supreme Court of the State of Illinois.

[March 31, 1947.]

Mr. Justice Burton delivered the opinion of the Court.

This case presents the question whether the Interstate Commerce Commission has the power, under § 204 of the Motor Carrier Act, 1935,[1] to establish qualifications and maximum hours of service with respect to any "checker" or "terminal foreman," a substantial part of whose activities in that capacity consists of doing, or immediately directing, the work of one or more "loaders" of freight for an interstate motor carrier as such class of work is defined by the Interstate Commerce Commission in *Ex parte No.*

[1]The material parts of § 204 are:

"Sec. 204 (a) It shall be the duty of the Commission—

"(1) To regulate *common carriers* by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express; uniform systems of accounts, records, and reports, preservation of records, *qualifications and maximum hours of service of employees, and safety of operation and equipment.*

"(2) To regulate *contract carriers* by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, *qualifications and maximum hours of service of employees, and safety of operation and equipment.*

"(3) To establish for *private carriers of property* by motor vehicle, if need therefor is found, reasonable requirements to promote *safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. . . .*" (Italics supplied.) 49 Stat. 546, 49 U. S. C. § 304 (a) (1) (2) (3).

MC–2, 28 M. C. C. 125, 133–134,[2] although the rest of his activities do not affect the safety of operation of any such motor carrier.[3]

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[2] "(2) *Loaders.*—. . .

"The large carriers, . . . particularly those who have important operations from terminal to terminal, employ men variously called loaders, dockmen, or helpers, and hereinafter called loaders, whose sole duties are to load and unload motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse.

"The evidence makes it entirely clear that a motor vehicle must be properly loaded to be safely operated on the highways of the country. If more weight is placed on one side of the vehicle than on the other, there is a tendency to tip when rounding curves. If more weight is placed in the rear of the vehicle, the tendency is to raise the front wheels and make safe operation difficult. Further, it is necessary that the load be distributed properly over the axles of the motor vehicle.

"Proper loading is not only necessary when heavy machinery, steel, and other like commodities are being transported, but is of importance when normal package freight is handled. If several packing cases weighing from 150 to 200 pounds are loaded on one side of a motor vehicle or at one end thereof, and lighter freight on the other side or at the other end, safe operation is difficult. The great majority, if not all, of the carriers whose operations are of sufficient size or character to justify the employment of loaders handle freight of such weight that proper loading is necessary." *Ex parte No. MC–2*, 28 M. C. C. 125, 133–134.

[3] Throughout this case it has been recognized that it was within the power of the Commission to establish the qualifications and maximum hours of service for the regular "loaders" who served under the immediate direction of the petitioner. No claim has been made on their behalf to the benefits of § 7 of the Fair Labor Standards Act. The present controversy is limited to the status of the petitioner himself. His status is referred to throughout this opinion as that of a "partial-duty loader," except where he is referred to by his own designation of himself as a "checker" or "terminal foreman." The term "partial-duty loader" is used in preference to that of "part-time loader," so as to avoid the implication that time spent in certain activities, rather than the character of those activities, is to be the conclusive factor in deciding whether or not the individual is subject to the jurisdiction of the Commission.

We hold that the Commission has that power and that § 13 (b) (1) of the Fair Labor Standards Act [4] therefore expressly excludes any such employee from a right to the increased pay for overtime service prescribed by § 7 of that Act.[5]

In this action, brought in the Municipal Court of Chicago, pursuant to § 16 (b) of the Fair Labor Standards Act,[6] the petitioner recovered judgment against his employer, the respondent, for $487.44 for unpaid overtime compensation for petitioner's services, as a "checker" or "terminal foreman," computed in accordance with § 7 of

[4] "SEC. 13. . . .

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . . ." 52 Stat. 1068, 29 U. S. C. § 213 (b) (1).

[5] "SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063, 29 U. S. C. § 207 (a).

[6] "SEC. 16. . . .

"(b) Any employer who violates the provisions of . . . section 7 of this Act shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 52 Stat. 1069, 29 U. S. C. § 216 (b).

that Act. In addition, the judgment included $487.44 as liquidated damages, and $175 as an attorney's fee, making a total of $1,149.88 and costs. The defense was that, under § 13 (b) (1), the provisions of § 7 did not apply to the petitioner's service. On that ground, the judgment was reversed by the Appellate Court of Illinois and the cause remanded with directions to enter judgment, with costs, for the respondent. 323 Ill. App. 505. The Supreme Court of Illinois affirmed. 389 Ill. 466. We granted certiorari because of the importance of the question in interpreting the Motor Carrier Act and Fair Labor Standards Act. 326 U. S. 703. It was argued at the October Term, 1945, of this Court and, on January 2, 1946, was restored to the docket for reargument before a full bench at this Term. It was so argued on October 21 and 22, 1946. In addition to the briefs and arguments on behalf of the parties, we have had the benefit of those presented, at our request, on behalf of *amici curiae*. These were from the Administrator of the Wage and Hour Division, United States Department of Labor, who supported the position of the petitioner, and, on the other hand, from the Interstate Commerce Commission which claimed that it possessed, under the Motor Carrier Act, the power to establish qualifications and maximum hours of service with respect to the petitioner. The Solicitor General, also at our request, filed a memorandum. In it he supported the petition for certiorari and took what he has described as "a position somewhat between that of the Commission and that of the Wage and Hour Administrator."

The respondent is a Missouri corporation, licensed in Illinois, and engaged in interstate commerce as a motor carrier of freight. It does not appear whether the respondent is a common carrier, contract carrier or private carrier of property. The result, however, does not turn upon differences between those classifications. The petitioner was employed by the respondent from October 1,

1940, through October 6, 1941, in one or more capacities which he designates generally as those of a "checker" or "terminal foreman." While the evidence is conflicting as to some of his duties, there is ample to sustain the judgment of the Supreme Court of Illinois on the basis that a substantial part of his activities consisted of doing, or immediately directing, the work of one or more "loaders" of freight for an interstate motor carrier as that class of work is defined by the Interstate Commerce Commission. The Supreme Court of Illinois accepted the Appellate Court's description of petitioner's activities.[1] The power of the

[1] See note 2 for the Commission's general definition of the work of "loaders." The Appellate Court of Illinois described the petitioner's activities as follows:

"Plaintiff [petitioner] contends he is a checker, not a loader, and therefore, not within the Commission's interpretation. We believe that his duties—not the name given his position—are determinative. . . .

"Defendant Terminal at 600 West 25th Street, Chicago, is the scene of these phases of motor carrier business—inbound freight, outbound freight and local freight. Trucks carrying freight originating locally and in foreign cities and States, are unloaded by gangs of defendant's employees. A gang usually consists of 3 or 4 men—a checker, caller, sorter and packer. The checker directs the gang's operation. Day and night foremen supervise the activities of all the gangs. Incoming freight is unloaded and deposited according to its destination on the dock in various sections at the direction of the checker; likewise under the direction of the checker, it is removed from these sections and loaded on appropriate outgoing trucks. It is loaded according to size and weight; heavy weighted or 'bottom freight' being distributed in the lower part of the truck and lighter weighted or 'balloon freight' is placed at the top. This plan is followed in the interest of safety of equipment and of freight. Testimony pertinent to the issue on the merits is that, as checker, plaintiff supervised and directed the unloading and disposition of incoming freight and the collecting and loading of the outgoing freight and that he watched the disposition of the weight of the freight in loading. The dispute in the testimony arises as to the quantity of plaintiff's activities devoted to these particular duties. Plaintiff says that most of the outbound freight was handled at night, while he worked mostly days; that not much loading was done during his hours, but

Commission to establish qualifications and maximum hours of service with respect to such "loaders" has been defined and delimited by it in a series of well-considered decisions, dating from the extension of its jurisdiction, in 1935, so as to include motor carriers.

The history of the development of the congressional safety program in interstate commerce, up to and including the enactment of the Motor Carrier Act in 1935 and the Fair Labor Standards Act in 1938, tells the story.

In comparable fields, Congress previously had prescribed safety equipment, limited maximum hours of service and

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that, whatever took place, was under his direct charge. The defense testimony is that inbound and outbound freight was equally divided during the day—inbound usually during the night and outbound between 8 a. m. and midnight.

". . . There is no question that some part of plaintiff's workweek was devoted to the direction and supervision of the loading of interstate motor freight carriers. There is no question either that the loaders in his gang were exempted from section 7 of the Fair Labor Standards Act. We think, therefore, that with greater force, plaintiff comes within the exemption for, if the loaders are exempt because the manner in which they work affects the safety of the operation of defendant's motor vehicles, certainly the duties of plaintiff, who planned and directed the loading, affect that safety. Considering the purpose of the Motor Carriers Act, we believe that the true determinant is whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial." *Levinson* v. *Spector Motor Service*, 323 Ill. App. 505, 507, 508–509.

The Supreme Court of Illinois said:

"We think the question of fact to be properly determined in this case is whether or not a substantial part of plaintiff's work affects safety of operation of motor vehicles, and that this question of fact controls this case. If it be determined from the evidentiary facts that plaintiff, in a substantial part of his work, was engaged in safety of operation of motor vehicles, or the cargo thereof, he would be exempted from the Fair Labor Standards Act, as a matter of law.

". . . under the facts as found by the [Appellate] court, the employee came within the same exemption as loaders, dockmen and helpers." *Levinson* v. *Spector Motor Service*, 389 Ill. 466, 473–474.

imposed penalties for violations of its requirements.[5] In those Acts, Congress did not rely upon increases in rates of pay for overtime service to enforce the limitations it set upon hours of service. While a requirement of pay that is higher for overtime service than for regular service tends to deter employers from permitting such service, it tends also to encourage employees to seek it. The requirement of such increased pay is a remedial measure adapted to the needs of an economic and social program rather than a police regulation adapted to the rigid enforcement required in a safety program. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577–578.

By 1935, 40 states had attempted to regulate safety of operation of carriers by motor vehicle. Some had established qualifications and maximum hours of service for drivers and helpers. Increased interstate movements of motor carriers then made necessary the *Motor Carrier Act, 1935*, approved August 9, 1935, as Part II of the Interstate Commerce Act, 49 Stat. 543. This Act vested in the Interstate Commerce Commission power to establish reasonable requirements with respect to qualifications and maximum hours of service of employees and safety of operation

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[5] The *Safety Appliance Acts*, approved March 2, 1893, 27 Stat. 531; March 2, 1903, 32 Stat. 943; April 14, 1910, 36 Stat. 298; and February 28, 1920, 41 Stat. 499; see Title 45, U. S. C.—Railroads, and 49 U. S. C. § 26, all relate to railroads and are enforced by the Interstate Commerce Commission.

The *Hours of Service Act*, approved March 4, 1907, 34 Stat. 1415, 45 U. S. C. § 61, requires the Interstate Commerce Commission to enforce maximum hours of service for railroad employees engaged in the movement of trains. It includes also operators, train dispatchers and others having much to do with the safety of train movements although not riding the trains.

The *Seamen's Act*, approved March 4, 1915, 38 Stat. 1164, see 48 U. S. C. § 673, [illegible], prescribes maximum hours of service at sea and at anchor for sailors, firemen, oilers and others engaged in sailing or managing vessels. It establishes qualifications for seamen and prescribes crew requirements, safety equipment and sanitary facilities for certain types of vessels.

and equipment of common and contract carriers by motor vehicle. § 204 (a) (1) (2). Similar, but not identical, language was used as to private carriers of property by motor vehicle. § 204 (a) (3). The Act expressly superseded "any code of fair competition for any industry embracing motor carriers." § 204 (b). Section 203 (b) listed many types of motor carriers which were exempted in general from the Act but that Section significantly applied to all of them the provisions of § 204 as to qualifications, maximum hours of service, safety of operation and equipment.[9]

[9] "SEC. 203. . . .

"(b) Nothing in this part, *except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment* shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; or (5) trolley busses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service; or (6) motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof); or (7) motor vehicles used exclusively in the distribution of newspapers; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202, shall the provisions of this part, *except the provisions of section 204 relative to qualifications and maximum hours of service of*

It is even more significant that in 1942, several years after enactment of the Fair Labor Standards Act of 1938, Congress slightly, but expressly, expanded the jurisdiction of the Commission over these subjects of qualifications, maximum hours of service, safety of operation and equipment and thereby restricted, to a corresponding degree, the application of the compulsory overtime provisions of the Fair Labor Standards Act.[10]

employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business." (Italics supplied.) 49 Stat. 545, 49 U. S. C. § 303 (b).

[10] A new § 202 (c) was inserted in the Motor Carrier Act by the Transportation Act of 1940, 54 Stat. 920, so as to exclude from the Motor Carrier Act certain motor vehicle pickup and delivery service within terminal areas. This exclusion automatically put certain employees, who were engaged in that service, beyond the power of the Interstate Commerce Commission to establish their qualifications and maximum hours of service under § 204 of the Motor Carrier Act. The Administrator of the Wage and Hour Division, United States Department of Labor, thereupon regarded some of them as entitled to the benefits of § 7 of the Fair Labor Standards Act as to compulsory overtime pay. However, when this new § 202 (c) was amended by the Act of May 16, 1942, 56 Stat. 300, 49 U. S. C. Supp. V, § 302 (c), to include freight forwarders, Congress also added to it a general clause to the effect that "the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment" should apply to the exempted operations. This amendment was an express recognition by Con-

In 1940, this Court, in *United States v. Amer. Trucking Ass'ns*, 310 U. S. 534, recognized the emphasis given by Congress to the clause "qualifications and maximum hours of service" in §§ 204 (a) and 203 (b). That decision reviewed the legislative history of the Act and held "that the meaning of employees in § 204 (a) (1) and (2) is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications or hours of service of any others." *Id.* at 553. The opinion dealt with employees who devoted themselves exclusively to their respective assignments, such as those of drivers on the one hand or of clerks on the other. It demonstrated that § 204 (a) (1) and (2) related to the former but not to the latter.[11] It did not discuss its relation to employees who, as in the present case, are required to divide their activities between those affecting safety of operation and those not affecting it.

In *Southland Co. v. Bayley*, 319 U. S. 44, this Court applied similar reasoning to an employee of a private carrier of property under § 204 (a) (3). It recognized the Commission's power to find a need for its action and, having found it, to establish qualifications and maximum hours of service for employees of private motor carriers of property affecting the safety of operation of such carriers. It held that, under § 13 (b) (1) of the Fair Labor Standards Act, the Commission's mere possession of that power, whether exercised or not, necessarily excluded all

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gress of the need for control by the Commission over the qualifications and maximum hours of service of these employees in the interests of public safety, although its provision for that control automatically deprived those employees of their recently acquired private rights to higher overtime pay under § 7 of the Fair Labor Standards Act.

[11] In *Overnight Motor Co. v. Missel*, 316 U. S. 572, an employee who served an interstate motor carrier as a rate clerk and performed other incidental duties, none of which were connected with safety of operation, was given judgment for the overtime compensation prescribed by § 7 of the Fair Labor Standards Act.

employees, with respect to whom the power existed, from the benefits of the compulsory overtime provisions of § 7 of that Act. The present case involves a comparable situation in that the Commission has found there that it has the power to establish qualifications and maximum hours of service for those doing the work of loaders for common or contract motor carriers or private motor carriers of property, but it has not found it advisable, as yet, to establish qualifications and maximum hours of service for that work.

The logic of the situation is that Congress, as a primary consideration, has preserved intact the safety program which it and the Interstate Commerce Commission have been developing for motor carriers since 1936. To do this, Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service. Congress might have done otherwise. It might have permitted both Acts to apply. There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in § 7 of the Fair Labor Standards Act. Such overlapping, however, has not been authorized by Congress [12] and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act. When examined from the point of view of the Motor Carrier Act alone, much light is thrown on the meaning of its § 204 by the interpretation given to it and the applications made of it by the Interstate Commerce Commission.

[12] See note 27, *infra*.

The reports and regulations of that Commission, issued under authority of Part II of the Interstate Commerce Act, both before and after the enactment of the Fair Labor Standards Act, deal so thoroughly and expertly with the safety of operation of interstate motor transportation as to entitle them to especially significant weight in the interpretation of this Act, the enforcement of which has been committed by Congress solely to that Commission.

The principal reports and regulations of the Commission, bearing upon the present controversy, are the following: [13]

[13] Shortly after the Act became effective, the Commission, on its own motion, instituted the *Ex parte* proceedings listed below. These resulted in many hearings, examiners' reports and divisional and Commission reports thoroughly and comprehensively covering the subjects investigated. Further comparable investigations directed by the Section of Safety of the Bureau of Motor Carriers of the Interstate Commerce Commission are pending. One of these is to determine what, if any, qualifications and maximum hours of service should be established by the Commission for mechanics, loaders and helpers.

Ex parte No. MC-2, Order of July 30, 1936. This related to *maximum hours of service* of employees engaged in motor carrier transportation and to regulations as to such hours of service pursuant to § 204 (a) (1) (2) and (3). See 3 M. C. C. 665, 666. It dealt with *drivers* for common and contract carriers. It led to the holding that *mechanics, loaders* and *helpers* are within the jurisdiction of the Commission because of their activities affecting the safety of motor carrier transportation. 28 M. C. C. 125.

Ex parte No. MC-3, Orders of July 30, 1936, December 23, 1936, and July 12, 1938. This related to *qualifications, maximum hours of service* of employees, safety of operation and equipment of *private carriers of property* by motor vehicle. 23 M. C. C. 1, and see 1 M. C. C. 1, 16.

Ex parte No. MC-4, Order of August 21, 1936. This related to *qualifications* of employees, safety of operation and equipment of common and contract motor carriers. It dealt especially with *drivers*. 1 M. C. C. 1.

Ex parte No. MC-28, Order of November 2, 1938. This related to the jurisdiction of the Commission over the establishment of *qualifications and maximum hours of service* of employees of common, contract and private carriers of property by motor vehicle under § 204 (a).

December 23, 1936. 1 M. C. C. 1. *Ex parte No. MC-1* established qualifications for drivers of interstate, common or contract carriers by motor vehicle, outlined a long term safety program and issued regulations as to safety of operation and equipment, constituting Parts, I, II, III and IV of motor carrier safety regulations.

December 29, 1937. 3 M. C. C. 665. *Ex parte No. MC-2* established maximum hours of service for drivers of interstate, common or contract carriers by motor vehicles. Part V of such regulations.

July 9, 1938. 8 M. C. C. 162. *Ex parte No. MC-4* modified Part III of such regulations as to safety glass.

July 12, 1938. 6 M. C. C. 557. *Ex parte No. MC-2*, in the light of current experience, modified Part V of the regulations as to maximum hours of service for such drivers.

December 3, 1938. 10 M. C. C. 533. *Ex parte No. MC-4* adapted the Commission's general qualifications and regulations to those types of carriers which were exempted from the Motor Carrier Act by § 203 (b), but which had remained subject to the jurisdiction of the Commission, under § 204, as to qualifications and maximum hours of service of employees, safety of operation and equipment.

January 27, 1939. 11 M. C. C. 203. *Ex parte No. MC-2* further modified Part V of regulation as to maximum hours of service of drivers for common and contract carriers by motor vehicle.

May 9, 1939. 13 M. C. C. 481. *Ex parte No. MC-28* interpreted § 204 (a) as giving the Commission authority to prescribe qualifications and maximum hours of service of employees of common, contract and private carriers of

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The decision limited such jurisdiction to *employees affecting safety of operation* by motor vehicles. 13 M. C. C. 481.

The results of these proceedings are summarized in the text of this opinion in the order in which such results have been announced.

property by motor vehicle only as to those employees whose activities affected safety of operation. It said:

> "Our experience and the study we necessarily made in connection with the administration of the Motor Carrier Act qualify us to prescribe such regulations [i. e., as to drivers], to promote safety of operation. Quite the contrary would be true if we were called upon to prescribe general qualifications for all employees of such carriers." *Id.* at 485.

Clerks, salesmen and executives were named as not being within the Commission's jurisdiction. Referring further to its power to prescribe qualifications and maximum hours of service with respect to drivers and others, the Commission said:

> "That power undoubtedly extends to drivers of such vehicles. It may well be that the activities of some employees other than drivers likewise affect the safety of operation of motor vehicles engaged in interstate and foreign commerce. If common and contract carriers, or private carriers of property, or their employees believe that the activities of employees other than drivers affect the safety of operation of motor vehicles engaged in interstate and foreign commerce, they may file an appropriate petition, asking that a hearing be held and the question determined." *Id.* at 488.

May 27, 1939. 14 M. C. C. 669. *Ex parte No. MC-4.* The "Motor Carrier Safety Regulations, Revised," were found to be "reasonable requirements with respect to qualifications of employees and safety of operation and equipment of common carriers and contract carriers subject to the Motor Carrier Act, 1935, and that said revised regulations should be approved, adopted and prescribed." *Id.* at 683. These revisions strengthened the provisions as to qualifications of drivers, for common and contract carriers, as to eyesight, physical condition, age, and ability to read and speak English. They extended the maximum hours of service regulations to drivers for the "exempt car-

riers" enumerated in § 203 (b), excepting only those referred to in subparagraph (4a) relating to farmers.[14]

June 15, 1939. 16 M. C. C. 497. *No. MC–C–139.* Upon petition of American Trucking Associations, Incorporated, et al., the Commission reaffirmed its decision of May 9, 1939, in *Ex parte No. MC–28*, and stated the negative side of the proposition there established. It said that § 204 (a) "does not empower us to prescribe maximum hours of service for employees of motor carriers whose activities do not affect the safety of operation." *Id.* at 497.

May 1, 1940. 23 M. C. C. 1. *Ex parte No. MC–3.* Following extended hearings, the Commission made findings that are important here. First, it found, as required by § 204 (a) (3), that "there is need for Federal regulation of private carriers of property to promote safety of operation of motor vehicles used by such carriers in the transportation of property in interstate or foreign commerce." *Id.* at 42. With comparatively few exceptions, such as those relating to farm trucks and industry trucks, the Commission then applied to drivers for private carriers of property by motor vehicle in interstate and foreign commerce the same qualifications, maximum hours of service and regulations as to safety of operation and equipment that it previously had prescribed, by its orders in *Ex parte No. MC–2, supra*, and *Ex parte No. MC–4, supra*, for drivers of common and contract carriers. *Id.* at 22, 42.

The significance of this action in relation to the present case is that, in considering the classes of work done by drivers for private motor carriers, the Commission found many instances where only a part of the driver's activities related to driving or to other operations affecting safety of transportation. For example, the Commission dealt with drivers of farm trucks. Section 203 (b) (4a) of the Motor Carrier Act exempts farm trucks, for most purposes,

[14] See note 9, *supra*.

from the provisions of that Act. Nevertheless, § 204 retains them within the jurisdiction of the Commission with respect to the qualifications and maximum hours of service of employees whose activities affect the safety of operation of interstate carriers by motor vehicle. The Commission recognized that such drivers have many duties unrelated to those of driving or safety of operation; that farm trucks, to a large extent, do not travel public highways; that the work is not a year-round operation but generally is confined to the harvest season; but that, nevertheless, whenever such a truck is being operated in interstate transportation on the public highway, the hazards involved in such operation are comparable to those faced by drivers who devote their entire time to interstate truck driving of all kinds. With appropriate modifications, the Commission thereupon prescribed for drivers of farm trucks qualifications and maximum hours of service different from, but comparable to, those it had prescribed for drivers of common and contract carrier trucks in general. Instead of its standard minimum requirement of 21 years of age, it set the minimum age requirement for drivers of farm trucks at 18, when the gross weight of the vehicle and load combined did not exceed 10,000 pounds. It declined to approve a minimum age of 16, although that had been accepted by some states. It eliminated the usual physical examinations. It relaxed its rule against transportation of passengers. It eliminated its requirement of keeping a driver's log showing a written record of the trips and stops made by each driver. It retained, however, its restriction against driving more than 10 hours in any one day and, in place of the prohibition against a total of more than 60 hours on duty in a week, it limited the total hours of driving, as distinguished from other duties, to 50 hours in a week. *Ex parte No. MC-3*, 23 M. C. C. 1, 27–28, 43.

The Commission took comparable action as to industry trucks. It recognized, for example, that a bakery driver-salesman devotes much of his effort and time to selling

baked goods rather than to activities affecting the safety of operation of his truck. The Commission, however, did not relinquish jurisdiction over the qualifications of driver-salesmen nor did it refrain from regulating their driving time. It modified its usual rule by providing that, if a driver-salesman "spends more than 50 percent of his time in selling and less than 50 percent in performing such duties as driving, loading, and unloading," he may be permitted to exceed the usual limit of 60 hours on duty in any week of 168 consecutive hours, provided only that "his hours of driving are limited to a total of not more than 40 in any such week," *Id.* at 44, and see 31 (recommending 50 hours). This use by the Commission of a percentage of the driver's time as a basis for the adjustment of his permissible maximum hours of service is to be distinguished from the suggestion of the Administrator of the Wage and Hour Division, United States Department of Labor, that the entire power of the Commission over safety regulations must be denied as a matter of law whenever, in any given week, an employee has devoted over 50% of his working time to activities not affecting safety, although he may have devoted the rest of his working time to driving a common carrier truck in interstate commerce.[15] It is essential to the Commission's safety program whenever and wherever hazardous activities are engaged in that affect safety of operation of an interstate motor carrier, that those who engage in them shall be qualified to do so and that maximum hours of service affecting such safety of operation shall be established and enforced. This means retaining and using, rather than relinquishing, the Commission's jurisdiction over partial-duty drivers and partial-duty loaders, a substantial part of whose activities affects the safety of interstate motor carrier operations,

[15] See Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, par. 4 (b), November, 1943, 1944-1945 WH Man. 520, 523, discussed at note 24, *infra*.

although the rest of their activities may not affect the safety of such operations.

Recognizing its potential jurisdiction over others than drivers, the Commission, in that proceeding, invited private carriers of property or their employees who "believe that the activities of employees other than drivers affect the safety of operation of motor vehicles engaged in interstate or foreign commerce" to institute proceedings in order that the question be determined. *Id.* at 44.

March 4, 1941.. 28 M. C. C. 125, *Ex parte Nos. MC-2* and *MC-3*. In the light of the foregoing experience and hearings, together with the decision of this Court in *United States, v. Amer. Trucking Ass'ns, supra*, the Commission, in this latest and most informative decision, found that the classes of activities which it defined as those of mechanics, loaders and helpers affect the safety of operation of motor vehicles and that, therefore, employees engaging in such classes of activities are subject to the Commission's power to prescribe their qualifications and maximum hours of service, pursuant to § 204 (a).[16] As related to loaders, the Commission announced the following findings of fact which are significant in the present case:

> "*Findings of fact.*— . . .
>
> "2. That loaders, as above defined,[17] employed by common and contract carriers and private carriers of property by motor vehicle subject to part II of the Interstate Commerce Act devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce.
>
> "4. That no employees of common and contract carriers or private carriers of property by motor vehicle, subject to part II of the Interstate Commerce Act, other than drivers and those classes of employees covered by the three preceding findings of fact [re-

[16] See note 2, *supra*, for the Commission's definition of the work of loaders.

[17] *Ibid.*

chanics, loaders and helpers], perform duties which directly affect safety of operation." *Ex parte No. MC–2*, 28 M. C. C. 125, 138–139.

These findings of fact are squarely within the jurisdiction of the Commission. They state affirmatively that, in the opinion of the Commission, the activities of loaders as described by the Commission do affect the safety of operation of motor vehicles in interstate or foreign commerce. They include also a finding that such loaders "devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce." In the absence of any discussion or classification, on a time basis, of the several activities of loaders described by the Commission, this additional finding amounts to another way of saying that a large part of the loader's activities affect such safety of operation. There is nothing to indicate that it uses the element of time other than as representative of the continuing work period during all of which the loader is devoting himself to the activities of his job as a loader. It amounts, therefore, merely to a finding as to the character of a large part of the activities of loaders, in accordance with the main purpose of the Commission's proceeding which was to determine to what extent, if any, the activities of loaders affect safety of operation.

This additional finding, however, is material from another point of view. It recognizes tacitly that even a full-duty loader may engage in some activities which do not affect safety of operation. Such "non-safety" activities may make up another "large part" of the loader's total activities. They may constitute an even larger part of his activities than his safety-affecting activities. In the present case it was shown by the courts below that, in addition to his activities in clerical checking, etc., a "substantial part" of the petitioner's activities consisted of the very kind of activities of a loader which the Commission has described as directly affecting safety of oper-

ation. If it be suggested that significance should be attached to the Commission's use of the word "large" rather than the lower courts' use of the word "substantial" in this connection, such significance disappears completely when it is seen that the Commission itself substitutes the word "substantial" for the word "large" in its conclusion of law which is quoted below.

While the indefiniteness of the terms "large" or "substantial" is obvious, nevertheless, those are the words which the Commission has chosen to use in dealing with this subject. Arbitrary or sharp lines of distinction do not lend themselves readily to supplying that extra margin of security which is natural in safety engineering. The fundamental test is simply that the employee's activities affect safety of operation. This is the test prescribed by this Court in *United States* v. *Amer. Trucking Ass'ns, supra.* The verb "affect" is itself incapable of exact measurement. Furthermore, we are dealing here not with the final application of the power of the Commission, but rather with the limits of its discretionary power to establish the qualifications and maximum hours of service when and where deemed by it to be needed. In issuing its regulations, the Commission itself can supply whatever definiteness the occasion shall require. From the point of view of the safety program under the Motor Carrier Act, there is no need for a sharply drawn limit to the power of the Commission to make regulations with respect to employees whose activities affect the safety of operation of motor vehicles in interstate or foreign commerce.

Turning to the conclusions of law which were reached by the Commission in the same proceeding we find the following:

> *"Conclusions of law.—*
>
> "2. That our jurisdiction to prescribe qualifications and maximum hours of service for employees of common and contract carriers and private carriers of

property by motor vehicle is limited to those employees who devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce.

"3. That we have power, under section 204 (a) of said part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above [mechanics, loaders and helpers], and that we have no such power over any other classes of employees, except drivers.

"A further hearing will be held to determine what regulations, if any, should be prescribed for those employees, other than drivers, whom we have found subject to our jurisdiction. No order is necessary at this time." *Ex parte No. MC-2*, 28 M. C. C. 125, 139.

As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration. Conclusion of law No. 2 must be read in close connection with finding of fact No. 2 and conclusion of law No. 3. It is apparent that, in conclusion of law No. 2, the phrase "employees who devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles" is intended to match the corresponding phrase in finding of fact No. 2 as to loaders who "devote a large part of their time to activities which directly affect the safety of operation of motor vehicles." This is made still more clear by conclusion of law No. 3 which finds that the Commission has jurisdiction to establish qualifications and maximum hours of service for the loaders included in both paragraphs. Here again there is no classification of the respective activities of loaders on the basis of the time devoted to each activity. The phrase closely

follows a discussion of full-duty loaders and its reference to a "substantial part of their time" is but another way of saying a "substantial part of their activities as loaders."

Addressing ourselves to the questions of law presented by the case before us, we reaffirm our position in *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, and *Southland Co.* v. *Bayley*, 319 U. S. 44. We recognize the Interstate Commerce Commission as the agency charged with the administration and enforcement of the Motor Carrier Act and especially charged with the establishment of qualifications and maximum hours of service of employees of common and contract carriers and private carriers of property by motor vehicle in interstate and foreign commerce. We see no reason to question its considered conclusion that the activities of full-duty drivers, mechanics, loaders and helpers, as defined by it, affect safety of operation of the carriers by whom they are employed. In harmony with our reasoning in *Southland Co.* v. *Bayley*, *supra*, and with that of the Interstate Commerce Commission in *Ex parte No. MC–3*, 23 M. C. C. 1, as to employees of private carriers, and in *Ex parte Nos. MC–2* and *MC–3*, 28 M. C. C. 125, as to mechanics, loaders and helpers in general, we hold that the Commission has the power to establish qualifications and maximum hours of service under § 204 (a) with respect to full-duty employees engaged in doing the work of loaders, although the Commission has not exercised that power affirmatively by establishing qualifications and maximum hours of service with respect to loaders.

In harmony with our decision in *United States* v. *Amer. Trucking Ass'ns*, *supra*, and of the Interstate Commerce Commission in *Ex parte No. MC–28*, 13 M. C. C. 481, we recognize that the Commission has such power over all employees of such carriers whose activities affect safety of operation and that the Commission does not have such power over employees whose activities do not affect safety of operation. In the *American Trucking Associations* case

it was not determined that it was necessary for any employee to devote all, or any precise share, of his working time or of his activities, to a particular class of work in order for such class of work to be held to affect safety of operation. It was assumed, for the purposes of that case, that the employee devoted his entire working time and activities to the single class of work under consideration.

It has been noted, however, that the Commission, in defining the class of work, as a whole, of loaders, recognized, in its findings of fact, that that class of work in its nature included duties other than those directly affecting safety of operation. It said: "We conclude that loaders devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce, and hence that we have power to establish qualifications and maximum hours of service for such employees under said section 204 (a)." *Ex parte No. MC-2*, 28 M. C. C. 125, 134, and see 139. This means that the nature of the duties of even a full-duty "loader" is such that it is not essential that more than a "large part" of his time or activities be consumed in activities directly affecting the safety of operation of motor vehicles—for example—loading, distributing and making secure heavy or light parcels of freight on board a truck so as to contribute as much as possible to the safety of the trip. On the other hand, it means also that more than half of the time or activities of a full-duty "loader" may be consumed in activities not directly affecting the safety of operation of motor vehicles—for example—in placing freight in convenient places in the terminal, checking bills of lading, etc. From the point of view of the Commission and its jurisdiction over safety operations, this indicates that it is not a question of fundamental concern whether or not it is the larger or the smaller fraction of the employee's time or activities that is devoted to safety work. It is the character of the activities rather than the proportion of either the employee's

time or of his activities that determines the actual need for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment. This line of reasoning is consistent with that applied throughout this case. It results in keeping within the jurisdiction of the Commission's safety program partial-duty loaders, as well as full-duty loaders, provided only that the class of work done by them affects safety of operation, regardless of whether or not in any particular week they may have devoted more hours and days to activities not affecting safety of operation, than they may have devoted to those affecting such safety of operation. The Commission uses similar language in asserting its jurisdiction over mechanics and helpers. This reasoning also resembles that by which the Commission imposes upon a "driver" a maximum total of 60 hours of service "on duty" of any kind, in a "week" of 168 consecutive hours, as well as a maximum of 10 hours, in the aggregate, of driving or operating of a motor vehicle in any period of 24 consecutive hours. *Ex parte No. MC–2*, 3 M. C. C. 665, 6 M. C. C. 557, 11 M. C. C. 203. For example, the Commission has recognized expressly that, in charter operations, the driver of a chartered bus may be on duty for long hours, but often may spend as little as one-half of that time actually driving. *Ex parte No. MC–2*, 3 M. C. C. 665, 679. All of these conclusions recognize that an employee who is engaged in a class of work that affects safety of operation is not necessarily engaged during every hour or every day in activities that directly affect safety of operation. While the work of a full-duty driver may affect safety of operation during only that part of the time while he is driving, yet, as a practical matter, it is essential to establish reasonable requirements with respect to his qualifications and activities at all times in order that the safety of operation of his truck may be protected during those particular hours or days when, in the course of his duties

as its driver, he does the particular acts that directly affect the safety of its operation.[18]

We have set forth the Commission's record of supervision over this field of safety of operation to demonstrate not only the extent to which the Commission serves Congress in safeguarding the public with respect to qualifications, maximum hours of service, safety of operation and equipment of interstate motor carriers, but to demonstrate the high degree of its competence in this specialized field which justifies reliance upon its findings, conclusions and recommendations.

Before examining further the new issue presented by the facts of this case, it is important to recognize that, by virtue of the unique provisions of § 13 (b) (1) of the Fair Labor Standards Act, we are *not* dealing with an exception to that Act which is to be measured by regulations which Congress has authorized to be made by the Administrator of the Wage and Hour Division, United States Department of Labor.[19] Instead, we are dealing here with the interpretation of the scope of the safety program of the

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[18] *See Richardson v. James Gibbons Co.*, 132 F. 2d 627, argued and affirmed with *Southland Co. v. Bayley*, 319 U. S. 44. In that case the Commission's power, under § 204 (a) (3), was upheld as to an employee who testified that he was employed "twenty-five per cent of the time as a truck driver and seventy-five per cent of the time as a distributor-operator" of liquid asphalt, and whose employer testified that the same employee "was employed approximately thirty per cent of the time in distributing asphalt and seventy per cent in transporting same." *Id.* at 628. Apparently his work was accepted as affecting safety of operation although only 25 to 30 of his time was spent as a driver and the balance of his time was spent in work not affecting safety of operation.

[19] Section 13 (b) (1), in this particular, is in sharp contrast with § 13 (a) (1) which provides as follows for the definition and delimitation of that exemption by the Administrator:

"SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the

Interstate Commerce Commission, under § 204 of the Motor Carrier Act, which in turn is to be interpreted in the light of the regulations made by the Interstate Commerce Commission pursuant to that Act. Congress, in the Fair Labor Standards Act, does not attempt to impinge upon the scope of the Interstate Commerce Commission safety program. It accepts that program as expressive of a pre-existing congressionally approved project. Section 13 (b) (1) of the Fair Labor Standards Act thus requires that we interpret the scope of § 204 of the Motor Carrier Act in accordance with the purposes of the Motor Carrier Act and the regulations issued pursuant to it. It is only to the extent that the Interstate Commerce Commission does *not* have power to establish qualifications and maximum hours of service pursuant to said § 204, that the subsequent Fair Labor Standards Act has been made applicable or its Administrator has been given congressional authority to act. This interpretation puts safety first, as did Congress. It limits the Administrator's authority to those "employees of motor carriers whose activities do not affect the safety of operation." *No. MC-C-139*, 16 M. C. C. 497.

Accordingly, we should approach the issue of the partial-duty driver and the partial-duty loader squarely from the point of view of the safety program of the Interstate Commerce Commission, as developed under § 204 of the Motor Carrier Act, apart from the Fair Labor Standards Act. The principle to be applied is the same in the case of the loader as in that of the driver, although the issue is more obvious when the test of jurisdiction is applied to the driver than when applied to any other class of employees of the motor carrier. This is because the driver's work more

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capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); . . . ." 52 Stat. 1067, 29 U. S. C. § 213 (a) (1). See also, §§ 213 (a) (8), 213 (a) (10) and 214.

obviously and dramatically affects the safety of operation of the carrier during every moment that he is driving than does the work of the loader who loaded the freight which the driver is transporting. Furthermore, in the case of the driver, the Commission not only has found that it has the power to establish, but it actually has established, tested and revised, a set of qualifications for his service and a maximum limitation on the aggregate number of hours during which he safely may be permitted to drive during any period of 24 consecutive hours. It also has established a maximum limitation on the number of hours during any "week" of 168 consecutive hours during which such a driver safely may be permitted to be "on duty", even though many of his activities and much of his time while "on duty" may not affect safety of operation of the carrier.[20]

In the present case, the issue is whether the Commission has the power to establish qualifications and maximum hours of service with respect to partial-duty loaders comparable to the petitioner. It is not necessary, as a condition precedent, to find that the Commission has exercised, or should exercise such power by actually establishing qualifications and maximum hours of service with respect to loaders in general, corresponding to those established for drivers in general. The existence of the power is enough. The fact that the Commission has found it necessary to establish qualifications and maximum hours of service which cover not only drivers, but also partial-duty drivers, is an indication that, in the opinion of the Commission, its power, under the Motor Carrier Act, extends to partial-duty as well as to full-duty employees en-

[20] Safety Regulations for Carriers by Motor Vehicle, 47 CFR, Cum. Supp., Part 190—General Definitions; Part 191—Hours of Service; Part 192—Qualifications of Drivers; Part 193—Driving of Motor Vehicles; Part 194—Necessary Parts and Accessories; Part 195—Accident Reports; Part 196—Inspection and Maintenance.

gaged in activities affecting the safety of operation of interstate motor carriers.

The principle can be tested by the use of a partial-duty driver as an example. His activities are such that the exclusion of them from the Commission's safety program would have serious consequences. In the case of the full-duty driver, there is no question as to the power of the Commission to establish reasonable requirements with respect to his qualifications and hours of service.[21] Regulations on these subjects were in effect throughout the period with which this case is concerned. In the class of work referred to by the Commission as that of driver-salesmen of industry trucks, the regulations which have been issued have been mentioned above.[22] These were adapted expressly to drivers who devoted less than 50% of their time to driving. The effect thus given by the Commission to the fact that such employees devote less than one-half of their time to driving is not to exclude such partial-duty drivers from any of its required qualifications. These qualifications include those relating to eyesight, physical condition, age, or ability to read or speak English, etc., which are deemed by it to be important for drivers in general. On the other hand, this fact that certain employees devote a part, rather than all, of their time to driving has brought forth from the Commission an appropriate modification of its safety regulations to fit that

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[21] See 47 CFR, Cum. Supp., Parts 191 and 192.

[22] Discussed at pages 16–17, *supra*. *Ex parte No. MC–3*, 23 M. C. C. 1, 31, 44.

". . . no driver salesman employed by a private carrier of property who devotes more than 50 percent of his time to selling and less than 50 percent to such work as driving, loading, unloading, and the like, shall be permitted or required to drive or operate a motor vehicle for more than an aggregate of 50 hours in any week as defined in said § 191.1 (e)." [Such a "week" is defined as "any period of 168 consecutive hours beginning at the time the driver reports for duty, . . ."] 47 CFR, Cum. Supp., § 191.3 (b).

fact. The modification takes the form of eliminating the Commission's limitation on the total maximum hours that the employee can remain on duty in a week of 168 consecutive hours but limiting his hours of actual driving to an aggregate of not more than 50 in any such week. This requirement, established by the agency which is recognized by Congress as the one body authorized to establish qualifications and maximum hours of service applicable to drivers of motor carriers in interstate commerce, is a demonstration that such agency has found it necessary to make active use of its powers of regulation in this field of part-time driving. It follows, as a matter of principle, that, if such power exists with respect to full-duty drivers and partial-duty drivers because they affect the safety of operation of the interstate motor carriers, the power exists also with respect to full-duty loaders and partial-duty loaders because they too affect such safety of operation, although not in precisely the same manner.

From a safety standpoint, a partial-duty driver who drives 30 hours continuously and then drives no more during that week creates a greater hazard than the man who drives 10 hours daily for 6 days a week. The hazard of continuous driving is not measured adequately by the total hours during which the driver is employed during the week, nor is it eliminated by a law which entitles him merely to an increased rate of pay for whatever time, above 40 hours per week, he shall work in any one workweek. The loading of any truck load of mixed freight requires that the general qualifications of the loader be adequate, regardless of the proportion of his working time that may have been devoted to this activity or to other activities in that particular week. Similarly, his hours of continuous work during a day of heavy loading may render him unfit for loading the last truck on that day even though, for the entire balance of that week, he may engage in no activities whatever or may engage in only such activities as are unrelated to safety of operation.

We have in this case an employee working full time throughout his employment as a "checker" or "terminal foreman." If he had worked full time as a "loader" as defined by the Commission he would have been unquestionably within the jurisdiction of the Commission to the extent necessary to exclude him from § 7 of the Fair Labor Standards Act. Under the conclusions of law of the Commission in *Ex parte No. MC–2*, 28 M. C. C. 125, 139, a full-duty "loader" does not have to devote more than a "substantial part" of his time to activities directly affecting safety of operation in order to be subject to the power of the Commission to establish qualifications and maximum hours of service with respect to him. So here it is enough for the purposes of this case that a substantial part of the petitioner's activities consisted of the doing or immediate direction of the very kind of activities of a loader that are described by the Commission as directly affecting safety of operation. The petitioner's activities thus affected safety of operation, although it does not appear what fraction of his time was spent in activities affecting safety of operation. As a consequence, he comes within the power of the Commission to establish qualifications and maximum hours of service with respect to him and, by the express terms of § 13 (b) (1) of the Fair Labor Standards Act, he is excluded, automatically, from the benefits of § 7 of that Act.

Recognizing that it is the intent of the Fair Labor Standards Act to give full recognition to the safety program of the Motor Carrier Act, this conclusion does not conflict with the meaning or purpose of the Fair Labor Standards Act, although it does reduce the scope of application of the compulsory overtime compensation provisions of § 7 of that Act.

The contrary position which has been taken as to partial-duty drivers, mechanics, loaders and helpers by the Administrator of the Wage and Hour Division, United States Department of Labor, requires mention. This position

no doubt arose from a desire to give wide effect to the Fair Labor Standards Act in an effort to comply with its remedial character. Generally, an expansion of the jurisdiction of the Act does not conflict with jurisdictions established under other Acts of Congress, whereas here every expansion of the jurisdiction of the Act through interpretation of § 13 (b) (1) cuts down the jurisdiction of the Commission under § 204 of the Motor Carrier Act. Furthermore, in seeking a practical method of resolving other administrative difficulties such as that of determining the degree of interstate activity or administrative service which should be the measure of the jurisdiction of the Act or of exemption from it, the Administrator has found it practical to fix upon a specific proportion of time devoted to a particular kind of activity and to make that proportion decisive. In some instances, in regulations, he has used 20% as a test of substantiality.[23]

In an attempt to resolve the present difficulty in a similar manner, the Administrator at one time proposed that, if an employee in any given week devoted 20% or more of his time to activities not affecting safety of operation, he would be entitled to the benefits of the overtime provisions of § 7 of the Fair Labor Standards Act.[24] He soon abandoned this, but he has attempted to answer the question on a 50% basis in Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, November, 1943, 1944–1945 WH Man. 520, 523, as follows:

"4. . . .

"(b) It should be noted that any truck driver, drivers' helper, mechanic or loader employed by a common, contract, or private carrier who spends the

[23] 29 CFR, Cum. Supp., §§ 541.1 (f), 541.1 (a) (4), 541.4 (b), and 541.5 (b). See also, *Ralph Knight* v. *Mantel*, 135 F. 2d 514.

[24] Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, March, 1942, par. 5 (b), 1943, WH Man. 186, 189.

> greater part of his time during any workweek on non-exempt activities (such as producing, processing, or manufacturing goods, warehouse or clerical work, or other type of work which does not affect safety of operations) is not within the scope of the exemption contained in Section 13 (b) (1). It is the opinion of the Division that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time in work other than that which forms the basis of the exemption."

In paragraph 2 of this Bulletin he recognizes the limited legal effect to which this interpretation is entitled, especially insofar as it concerns the meaning of § 204 of the Motor Carrier Act.[25]

Such an interpretation conflicts, however, with the Commission's safety program. It conflicts directly, for example, with the regulation of the Commission as to partial-duty drivers of industry trucks of private carriers in interstate commerce.[26]

The fundamental and ever recurring difficulty with the Administrator's interpretation of the scope of § 7 of the Fair Labor Standards Act is that to the extent that he expands the jurisdiction of the Fair Labor Standards Act he must reduce the jurisdiction of the Commission under

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[25] "2. The scope of the exemption provided in section 13 (b) (1) involves the interpretation not only of the Fair Labor Standards Act but also of section 204 of the Motor Carrier Act, 1935. The Act confers no authority upon the Administrator to extend or restrict the scope of the exemption provided in section 13 (b) (1) or even to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the course which the Administrator will follow in the performance of his administrative duties until otherwise required by the authoritative rulings of the courts. It is nevertheless to be noted that the Supreme Court has held that the interpretations expressed in bulletins of this Division are entitled to great weight."

[26] See note 22, *supra*.

the Motor Carrier Act, whereas he has no authority to do so.[27]

Our conclusion is that, under the Motor Carrier Act, the Interstate Commerce Commission has power to establish qualifications and maximum hours of service for those employees whose service affects the safety of transportation of common carriers, contract carriers or private carriers of property in interstate and foreign commerce; that such Commission has been charged with the administration and enforcement of that Act; and that in the course of performance of its duties and after extended

[27] In 1945, upon the recommendation of the Administrator of the Wage and Hour Division, United States Department of Labor, S. 1349 was introduced proposing many amendments to the Fair Labor Standards Act. That Bill, as introduced and as recommended for passage by the Senate Committee on Education and Labor, proposed expressly to expand somewhat the scope of the Fair Labor Standards Act without reducing the jurisdiction of the Commission under the Motor Carrier Act, by amending § 13 (b) (1) to read:

"SEC. 13. . . .

"(b) The provisions of section 7 shall not apply with respect to (1) any employee who during the greater part of any workweek is engaged in work with respect to which the Interstate Commerce Commission has established qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935. . . . ."

Hearings on S. 1349 before the Subcommittee of the Senate on Education and Labor. September 25, 1945, pp. 4, 249, *et seq.*; Sen. Rep. No. 1012, 79th Cong., 2d Sess., pp. 3, 14, 17; Part 2, pp. 5, 135.

This Amendment, however, was eliminated on the floor of the Senate, 92 Cong. Rec. 2704, 3154, 3155, 3247, before passage of the Bill, April 5, 1946. Furthermore, it was not included in the companion Bill, H. R. No. 4130, as reported to the House of Representatives by the Committee on Labor June 16, 1946, H. R. Rep. No. 2300, 79th Cong., 2d Sess., although it was recommended in the minority report of that Committee. *Id.* at 7, 15, 19. See also, Hearings before the Committee on Labor of the House of Representatives, 1945, pp. 864, 905. Congress adjourned without taking final action on either Bill, but, when Congress adjourned, neither pending measure contained the proposal.

hearings on the subject, it has found that the work of loaders, as defined by it, affects safety of motor carrier operation. Furthermore, we conclude, upon the findings of the lower courts in this case, that the petitioner was employed by a motor carrier of interstate freight within the meaning of the Motor Carrier Act and that, throughout the period at issue, a substantial part of his activities consisted of doing, or immediately directing, the work of one or more loaders as defined by the Interstate Commerce Commission and affecting the safety of operation of motor vehicles in interstate or foreign commerce; that, accordingly, the Commission, with respect to him, had power to establish qualifications and maximum hours of service; and that, by virtue of § 13 (b) (1) of the Fair Labor Standards Act, the provisions of § 7 of that Act as to overtime pay were rendered inapplicable to him. The judgment of the Supreme Court of Illinois therefore is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 22.—October Term, 1946.

Max Levinson, Petitioner, v. Spector Motor Service, a Corporation. | On Writ of Certiorari to the Supreme Court of the State of Illinois.

[March 31, 1947.]

Mr. Justice Rutledge, dissenting.

As the Court's opinion says, there is no necessary inconsistency between enforcing Interstate Commerce Commission regulations concerning "qualifications and maximum hours of service of employees" affecting safety, 49 Stat. 543, 546, and at the same time, within those limitations, requiring compliance with the Fair Labor Standards Act's provisions for overtime pay. Indeed the latter would reinforce the former. Ordinarily, when statutes are not inherently conflicting, the rule applied in construing them is to give each as much room for operation as is consistent with its terms and purposes, rather than to create conflict unnecessarily between them.

Nothing in the Motor Carrier Act forbids or inhibits the operation of § 7 of the Fair Labor Standards Act. The latter statute, it has been held repeatedly, is to be broadly and liberally applied, in order to achieve its prime objects of distributing and raising standards of employment and living.[1] The Act however contains certain exempting provisions, which are to be narrowly construed in the light of and in order to accomplish the same statutory purposes.[2]

Among these is § 13 (b) (1). It reads: "The provisions of section 7 shall not apply with respect to (1) any

[1] *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 597; *Phillips Co.* v. *Walling*, 324 U. S. 490, 493; *Calaf* v. *Gonzales*, 127 F. 2d 934, 937.

[2] *Phillips Co.* v. *Walling*, *supra*; *Calaf* v. *Gonzales*, *supra*.

employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935 . . ." 52 Stat. 1060, 1068. It is the meaning and effect of § 13 (b) (1) which we have now to determine in relation to employees who do some work affecting safety in operations and some not affecting it.[3]

Read literally, in the light of the *Southland* decision,[4] the section would exempt all employees who do any work affecting safety operations, as the Illinois Court of Appeals held in this case.[5] For, factually speaking, not the amount of time an employee spends in work affecting safety, but what he may do in the time thus spent whether it be large or small determines the effect on safety. Ten minutes of driving by an unqualified driver may do more harm on the highway than a month or a year of constant driving by a qualified one.

It would seem essential therefore to effective safety control by the Commission that it should have power to determine the qualifications and maximum hours of service of all employees whose work substantially affects safety, whether or not they spend what may be found to be less

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[3] As to employees engaged full time in such work, *Southland Co.* v. *Bayley*, 319 U. S. 44, held that the existence of power in the Commission, whether or not exercised, to prescribe qualifications and hours of service, excludes them under § 13 (b) (1) from coverage under the Fair Labor Standards Act's terms. Cf. note 11.

[4] *Ibid.*

[5] The court said: ". . . We believe that the true determinant is whether an employee performs *any* duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial." 325 Ill. App. 505, 509. (Emphasis added.) This is also the Commission's position taken in the brief and at the argument in this cause. See note 16. The Illinois Supreme Court found the test in "a substantial part of the plaintiff's work." 389 Ill. 466, 473.

than a "substantial" amount of time in that sort of work. Anything less than this would open the door to the greatest danger to motor traffic from casual, unqualified drivers or other employees whose work affects safety.

There is or may be in some circumstances a relation between time spent in such work and substantial effects upon safety, but it is by no means an exclusive or controlling one. Time affects the duration and scope, not necessarily the existence, of the risk.

I accept the "safety first" view of the Commission's power. And this requires acceptance of the view that, in relation to some kinds of work, the Commission has power to prescribe the qualifications of all employees who engage in it to any extent, though the time thus spent is not five minutes daily or weekly. "Substantial effect" in these instances has little if any relation, negatively speaking, to "substantial time." Driving and the work of mechanical repair of trucks are obvious examples. Loading may be another, less obviously, as the Court says, but depending upon the circumstances under which it is done.[8] So with the work of helpers in these three functions.

Notwithstanding the Commission's contrary finding, this means that all employees who do any part of certain kinds of work, for however short a time, regularly or casually, fall within the Commission's power. It means, for instance, that a person who spends ten minutes a day or an hour a week in driving or in mechanically re-

[8] Thus, one who has the sole responsibility of loading or of directing loading, where weight of the articles carried is unequal and its distribution may affect safety, would seem clearly to be within the classification whether the time spent is large or small. On the other hand, if the worker is merely a helper, loading under direct and active supervision of another, with no responsibility other than to obey his superior's orders as to placement, it would seem clear that his work does not affect safety.

[9] See text *infra* at note 15; and note 16.

pairing trucks, and the remaining 39 hours of a 40-hour week in work having no effect upon safety falls within the Commission's authority. For, in such circumstances, it cannot be held that the comparatively minute amount of time spent in work affecting safety is trivial or inconsequential in its possible effects upon safety. And in the Court's view, as I understand it, the result is not only that the Commission has power to prescribe the qualifications of all such employees,[*] but also that they are thereby exempted from the overtime pay provisions of the Fair Labor Standards Act.

It is from the latter conclusion that I dissent. I cannot believe that Congress, when it incorporated § 13 (b) (1) in the statute, intended to exclude from those provisions every employee who might spend ten minutes a day in work substantially affecting safety and seven hours and fifty minutes in work having no effect whatever upon it. An exactly literal application of § 13 (b) (1), it is true, would lead to this result. But we are frequently told that rigidly literal application of a statute may be

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[*] The opinion puts the matter in various ways. *E. g.*, "The fundamental test is simply that the employee's activities affect safety of operations." "The term 'partial-duty loader' is used . . . so as to avoid the implication that time spent in certain activities, rather than the character of those activities, is to be the conclusive factor. . . ." Note 3. "It is essential to the Commission's safety program whenever and wherever hazardous activities are engaged in that affect safety . . . that those who engage in them shall be qualified . . ." "We recognize that the Commission has such power over all employees . . . whose activities affect safety. . . ." "It is the character of the activities rather than the proportion of either the employee's time or of his activities that determines the actual need for the Commission's power. . . ." "The loading of any truck load of mixed freight requires that the general qualifications of the loader be adequate, regardless of the proportion of his working time that may have been devoted to this activity. . . ." "The petitioner's activities thus affected safety of operation, although it does not appear what fraction of his time was spent in activities affecting safety of operation."

ruinous to achieving its purposes.[9] It is especially so in this instance, in view of the nature and purposes of the Act we are construing, for a variety of reasons.

The legislative history shows, in my judgment, that Congress did not have in mind so expansive and destructive an exemption as literal application of § 13 (b) (1) and the Court's ruling [10] would produce. Congress clearly intended to exempt some employees who do not devote all their time to such work. But at the time it acted its primary concern and that of the Commission [11] were with full-time employees, principally drivers, so engaged. In view of that fact, it cannot be taken that Congress intended every employee assigned for a few minutes daily or weekly to work substantially affecting safety to be eliminated from the overtime pay provisions. Such a view in practical effect would nullify the Act's broad and inclusive purposes for large numbers of employees as to whom, at the time, the Commission had shown no concern in exercising its safety power or in its representations to Congress, and as to whom therefore there was no sound reason for or purpose of exemption.

Moreover, acceptance of such a construction would set up an easy mode for evasion of the Fair Labor Standards

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[9] Cf. note 12. "All construction is the ascertainment of meaning. And literalness may strangle meaning." *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44; *Markham* v. *Cabell*, 326 U. S. 404, 409; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457.

[10] See note 8 and text *infra* at note 15.

[11] The exemption made by § 13 (b) (1) was suggested to Congress originally by the Interstate Commerce Commission. *United States* v. *American Trucking Assn.*, 310 U. S. 534, 549. The legislative history shows that the section "was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of *drivers*," *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, 48–49, upon the understanding that the Interstate Commerce Commission "had already acted upon maximum hours for drivers. . . ." *Id.*, at 49, n. 5. (Emphasis added.) See also note 16.

Act's requirements. An employer so minded readily could assign to nonsafety employees whom he desired to remove from the overtime pay requirements work affecting safety for minute portions of their total service. Committing the Act's coverage in all such possible situations to a determination of the employer's good faith could only invite continuous litigation upon his motive, a result in itself tending strongly to defeat the rights given by the Act. I do not think Congress intended such consequences for the statute's effective operation when it included § 13 (b) (1).

The difficulty lies of course not only in the rigidly literal interpretation given to that section, but in the corollary assumption of intended complete mutual exclusiveness of the Commission's power and the Fair Labor Standards Act's applicability drawn from it. As I do not think Congress intended the one, in relation to the problem now presented, so I do not believe it had the other in mind. And if this was true, then the problem for us becomes, as it most often does in such situations, one of making accommodation between the two statutes in a manner which will give to each its maximum effect without nullifying Congress' manifest intention.[12]

If the spirit and purposes of the statutes are taken into account, we are not inescapably compelled to choose between the equally untenable alternatives of a completely literal application of § 13 (b) (1) and a construction which would nullify the Commission's power concerning the great bulk of employees to which it rightfully extends. Although the exemption of § 13 (b) (1) is not among those

[12] "The problem of statutory construction . . . should not be solved simply by a literal reading of the exemption section of the Fair Labor Standards Act and the delegation of power section of the Motor Carrier Act. Both sections are parts of important general statutes and their particular language should be construed in the light of the purposes which led to the enactment of the entire legislation." *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, 47.

which specifically empower the Administrator to determine their scope by regulations,[13] he is charged with the duty of administering it and his experience is entitled to weight when he formulates conclusions from it for the purpose of applying the Act's provisions, albeit they are not conclusive. The present problem has not been without difficulty for the Administrator,[14] but his final ruling, resulting from his experience, presents in my opinion both the most workable solution and the one most consistent with Congress' purpose and intent relating to the operation of both Acts. It is that the exemption is inapplicable to any employee "who spends the greater part of his time during any workweek on non-exempt activities (such as producing, processing or manufacturing goods, warehouse or clerical work, or other type of work which does not affect safety of operations)."

Such a standard is more consistent with the Act's purposes than the one applied by the Court, not only in the light of the legislative history, but also in that it is more definite, more easily applied, and not invitingly conducive to litigation. For these reasons, and because I do not believe a totally literal application of § 13 (b) (1) was comprehended for the situations now presented, I think a line so drawn most nearly consistent with what Congress had in mind to accomplish by the exemption.

However, since there is no essential inconsistency in the two statutes or their operation, I do not think it necessarily follows that part-time employees thus not excluded

[13] See §§ 13 (a) (1), 13 (a) (7), 13 (a) (10), 14.

[14] The Administrator originally interpreted the exemption to be inapplicable to any employee who spent a substantial amount of his time in nonexempt work. Subsequently "substantial" was explained to mean more than twenty per cent of the employee's time. Interpretative Bulletin, No. 9, March, 1942, Wage & Hour Manual (1943 ed.) 186, 189. Later the ruling was changed so that the exemption was given its present form as stated in the text, *infra*. Interpretative Bulletin No. 9, October, 1943, Wage & Hour Manual (1944-1945 ed.) 520, 523.

from the Fair Labor Standards Act's coverage are thereby excluded from the Commission's safety power. That power I would leave unqualified as to them, since nothing in either statute compels qualification, as to employees not exempted, of the authority given the Commission to regulate "qualifications and hours of service of employees" whose work affects safety. The two statutes clearly are mutually exclusive, though not essentially inconsistent, as to employees primarily engaged in operations affecting safety. They are not necessarily or, I think, by virtue of Congress' intent or command, thus exclusive as to others.

I therefore agree that "substantial effect" upon safety rather than "substantial time" spent in doing work affecting it determines the scope of the Interstate Commerce Commission's safety power. However, in accepting this conclusion, though not the further one that all employees so covered are within the exemption of § 13 (b) (1), I do so not upon the basis of the Commission's own determination, which expressly adopts the criterion of "substantial time" and is therefore both narrower than and inconsistent with the Court's ruling as to the extent of its power.[15] The Commission's determination tends strongly to support the Administrator's position as to the scope of the exemption intended to be created by § 13 (b) (1). But its voice is

[15] The Court purports to adopt the Commission's basis for determining what employees are within the safety power, especially as made in *Ex parte Nos. MC–2* and *MC–3*, 28 M. C. C. 125. But since the test the Court now prescribes is apparently one of "substantial effect" rather than "substantial time," see note 8, it differs from the basis of the Commission's ruling. The Commission's findings of fact and conclusions of law are set forth in the text of the majority opinion. The quoted finding is that loaders "devote *a large part of their time* to activities which directly affect the safety of operation," 28 M. C. C. at 139. And the conclusion of law is stated in terms of time, namely, "that our jurisdiction . . . *is limited to* those employees who devote *a substantial part of their time* to activities which directly affect safety of operation," and "that we have power . . . to establish qualifications . . . for the classes of employees" covered by the findings of

only persuasive, not conclusive upon the question of the scope of its power. In adopting "substantial time" rather than "substantial effect," I agree that the Commission has ruled too narrowly. Indeed, its brief in this case maintains as much.[16] Accordingly I conclude, independently of its formal determination, that the full and adequate performance by the Commission of the safety function conferred by the Motor Carrier Act requires the larger scope which the Court's ruling allows for its operation.

The views expressed in this opinion, of course, would apply also in *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. ——, decided this day, but in view of the decision in this case it is not necessary to file a separate dissent in the companion one.

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this dissent.

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fact, and "that *we have no such power over any other classes of employees* except drivers." *Ibid.* (Emphasis added.) This necessarily excluded employees of the classes covered not devoting a substantial part of their time to work affecting safety, in view of the findings.

[16] The difference in the Commission's findings and conclusions, as made in *Ex parte Nos. MC-2* and *MC-3*, see note 15, and the position taken here by counsel in its behalf was the occasion for some difficulty, if not embarrassment, at the argument. The brief and argument, by contrast with the findings and conclusions, maintained: ". . . it seems clear that, regardless of the amount of time devoted to the work by an individual loader (or loader foreman), he is expected to be fitted, and in fit condition, to perform it when occasion arises and therefore intended to be subject to the Commission's authority over qualifications and hours of service." Reliance was placed squarely upon the position taken in this case by the Illinois Court of Appeals. See note 5.

Able counsel for the Commission sought to avoid the effect of the findings and conclusions by restricting it to classes of employees without reference to individual employees. It was not satisfactorily explained, however, how an individual employee could be brought within the class without being brought within the outer boundary prescribed by the Commission for defining the class.